[Rev Geo. Harbon]
See note in H. of C.

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present constitutio n, and the Protestant succession vindicated : in answer to a late book entituled, hereditary right of the crown of England asserted, &c

I Goodman

THE HEREDITARY RIGHT OF THE Crown of England ASSERTED;

THE

History of the Succession since the Conquest clear'd;

AND THE

True *English* Constitution vindicated

FROM THE

MISREPRESENTATIONS OF Dr. *Higden's View* and *Defence.*

WHEREIN

Some Mistakes also of our Common Historians are rectify'd; and several Particulars relating to the Succession, and to the Title of the House of *Suffolk*, are now first publish'd from Ancient Records and Original MSS; together with an Authentick Copy of King *Henry* VIII.'s Will.

By a Gentleman.

Ille, ut opes fractæ Teucrûm, & fortuna recessit,
Res Agamemnonias, victriciaque arma secutus,
Fas omne abrumpit. ---------- Virg. Æn. 3.

LONDON:

Printed by *G. James*, for Richard Smith, at Bishop *Beveridge's* Head in *Pater-Noster-Row.* MDCCXIII.

THE

HERALD'S ROLL

OF THE

Crown of Lusitania

ASSERTED

THE

HISTORY of the Succession

since the CONQUEST of

AND THE

Time Royal Constituted Vindicated

FROM THE

MISREPRESENTATIONS

OF

DR. Mathews Vindication Royal

WRITTEN

Some Instances are also given of the Usurpation Usurpers, as recently as, and several Particulars relating to the Conquest, and to the Title of the Houses of Aviz and Braganza, collected from Antient Records and Original Books; together with the Copy of King John's Will.

BY A GENTLEMAN

The at open Gates Tuscan Ye Princes Enter
Sacro Alphonsus, cui Deus omne dedit
Ecce Ferunt Sceptra.

LONDON:

Printed for Richard Smith, Stationer, in Cornhill. MDCCXIII.

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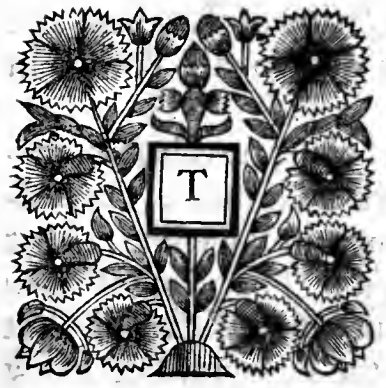
The End of the Contents.

The READER is desir'd to correct the following ERRATA *in the* INTRODUCTION, *with what others he may find in the Book.*

PAG. 2. Marg. r. *Sess.* 2. *c.* 1. P. 4. Marg. r. 12 *Car.* 2. *c.* 12. P. 6. l. 7. r. *Henry* IV. P. 8. l. *ult.* for *can make*, r. *is necessary to make.* P. 9. Marg. n. 1. r. *Def.* p. 137, 138. P. 11. Marg. (*a*) and (*b*) referr to *Richard Rich*, l. 10. And *Def.* p. 5. referrs to *He affirms*, l. 12. P. 13. Marg. *dele* vide.

THE

THE INTRODUCTION.



THE first Time that the Duty of Paying Allegiance to Powers in Possession began to be taught publickly in this Kingdom, was during the Usurpations, which succeeded the Death of King *Charles* I. Some Expressions to that Purpose had casually dropp'd from Lawyers, without examining the Question. In all former Revolutions, the Princes who got Possession of the Crown, claim'd it by some Right, and never insisted on Possession, as Right. But the *Rump-Parliament*, and *Cromwell*, and the following Usurpers, having no tolerable Pretence to any Claim of Right, their Friends were reduced to a Necessity of pleading *Possession*, as a Right to Obedience; and several Books were then publish'd by (*a*) Papists, Fanaticks, and Deists, to enforce and prove it. But this Principle was then generally rejected, by all the Members of the *Church of* England, and by many *Presbyterians*, who maintain'd, that Allegiance was due to the rightful King, who was not in Possession; and several (*b*) Authors of both Communions wrote against, and refuted the Title of Possession.

(*a*) Thomas White *a Papist*, *Dr.* Goodman, Baxter, Eaton, Ascham, Hobbes.

(*b*) *An Exercitation concerning usurped Powers: The Vindication of the Oath of Allegiance, in Answer to* Sam. Eaton, Sanderson, Pryn, *Lord* Clarendon, Bramhal, Cumberland, Tenison, *and all the Writers against* Hobbes, *and the University of* Oxford, *in the* Judicium Oxoniense.

After the Restoration, the Acts, Orders, and Judicial Proceedings of the Governments preceding, were all null and void, except such as were authorized by a new Law: And it was declared by an (*c*) Act of Parliament, That all the said Powers before in Possession, *were rebellious, wicked, traiterous, abominable Usurpations, detested by this present Parliament:* And the Reason follows immediately, *As opposite in the highest Degree to His Sacred Majesty's most just and undoubted Right, to whom and to His Heirs and law-*

(*c*) 12 Car. 2. *ch.* 12.

ful Successors, the Imperial Crown of the Realms of England, Scotland, *and* Ireland, *with their and every of their Dominions and Territories, do of Right appertain; and as violating the just Rights and Privileges of Parliament.* Here the Constitution was again resettled on its ancient Foundation; not on *Possession*, which all the Usurpers had; but upon the *undoubted Right* of the Lawful Heir, who had been out of *Possession*, and of his *Heirs and lawful Successors*, to whom it is here declared, that the said Dominions *do of Right appertain.* And agreeably to this Constitution, in that Reign it was the constant Doctrine of Lawyers and Divines, that Allegiance was not due to all Powers in *Possession.*

THE Revolution that happen'd after, was begun, carry'd on, ended, and justified on these Grounds, That Allegiance was not due to all Kings in Possession: That King *James* was lawfully depriv'd: That King *William* and Queen *Mary* were lawfully put into *Possession* (*d*). But these Positions did not suit with the Principles of many Lawyers and Divines, who had constantly maintain'd, that the Deposition of a lawful King was absolutely unlawful by the Law of GOD, and the Laws of this Kingdom: Therefore, to justify the Translation of their Allegiance, the former Opinion, that seem'd buried at the Restoration, was reviv'd; *viz.* That *Allegiance was due to all Powers in Possession*; and many eminent Members of the Church of *England* receiv'd it, as consistent with the Doctrine of Non-Resistance: Divers Treatises were then publish'd by Divines and Lawyers, to defend it; of these the most celebrated were the Compositions of great Writers renowned in Controversy (*e*). *The Unreasonableness of a new Separation*, and *the* (*f*) *Case of Allegiance due to Sovereign Powers.* The Instances of History and Parliament Records used in the first, were enquir'd into by an exact and faithful (*g*) Historian, and unanswerably refuted: The Arguments of the last from Scripture and Reason, the Doctrine of the Church, and the Laws of the Kingdom, were refuted likewise by several Writers; and no Reply of Moment being made, that Controversy seem'd to be buried again; but of late it hath had a second Resurrection.

(*d*) *Vide* 1 W. & M. *sess.* 2. *c.* 2.

(*e*) Stillingfleet.

(*f*) Sherlock.

(*g*) Brady.

THE Reverend Doctor *Higden* thought fit, after many Years of Satisfaction, to examine the Dispute again; and

and having weigh'd in his Judgment the Arguments against Possession, found them to be light in the Balance; and was convinc'd, that Allegiance was due to Kings in Fact, by Law Divine and Humane: And to convince others, he drew *A View of the* English *Constitution*, and some time after, a *Review* to defend it against several Answers, in which his new Scheme had been thoroughly refuted. It hath happen'd in this *View*, and the Defence of it, as it usually does, when the Eye is fix'd attentively on one Object; that single Object is alone regarded and consider'd, and the many different Objects in the same View, are either not seen at all, or not distinctly. It will appear probable at least, to every one who reads the Doctor's two Treatises with Attention, that when he look'd into *English* Law and History, he had always his Opinion directly in his Eye; that he observ'd what was fit for his Purpose; and what was not, he overlook'd, or saw it through a bad Perspective. Thus having collected all the Materials he could find in Law and History, favourable to Possession, he rounded, and smooth'd, and shap'd them, by his own Glosses, to his own Opinion, which he presented to the World in Print, and call'd it *A View of the* English *Constitution.*

But it appears not, that the Doctor, with all his Diligence, hath found out any material Proof of his Constitution, which his Predecessors in this Controversy had omitted. He hath himself given us a (*h*) Summary of his Proofs, which had been all urg'd and answer'd before, by the Writers on this Subject, after the Revolution; and most of them had been pleaded by the Writers for Possession before the Restoration.

(*h*) *Preface to his Defence.*

The Doctor indeed endeavours to distinguish himself from the Advocates of those Usurpers, and particularly *Cromwell*, who had been often objected by his Adversaries: And (*i*) *once for all he dispatches* Oliver by three killing Reasons, which it may be fit here to examine.

(*i*) *Defence*, p. 106, 107.

The first is, *That* Oliver *had not the Legislative Authority of the Kingdom, nor was ever acknowledg'd by our Kings to have had it; and therefore could not have the sovereign Authority of the Kingdoms.* He actually exercis'd all sovereign Power, Legislative, and Executive. By the Instrument of Government, (*k*) *The supreme Legislative Authority of the Kingdom was in his single Person, and the People*

(*k*) Dugdale, *Short View*, p. 414.

People in Parliament; but the Administration of it was left to the Lord Protector, and his Council, nominated by him. By his own Authority he made *Scotland* one Commonwealth with *England*; and he passed five Bills in his second Parliament: But *his Legislative Power was never acknowledg'd by our Kings.* His pretended Acts, on the contrary, were null after the Restoration. For what Reason? (*l*) The Law hath plainly declar'd it; because the Power that made those Acts was *Usurpation, opposite to the undoubted Right* of the King and his lawful Heirs, and the *just Rights* of Parliament. Will any one affirm, that the principal Reason of the Nullity of *Oliver*'s Acts is none? or that they were null for want of a lawful Parliament, and not for want of a lawful King? Will any one say, the Law affirms this? On the contrary, the Law is plainly declarative of the *true* English *Constitution*, that to the Authority of Law is requir'd a lawful King, and a lawful Parliament; and the Want of the first is the chief Cause of the Nullity, because without the first the second cannot have Existence.

(*l*) 1 *Car.* 2. *c.* 12.

THE second Reason is, *That* Oliver, *who had not the Regal Title and Office, could not have the Legislative Authority in this Monarchy, in which, by our Constitution, a Law cannot be made without a King or Queen; and therefore all the Acts of* Oliver *sunk of themselves, as Nullities* ab Origine. As to the Name King, *Oliver*, when his Parliament offer'd it, denied to take it; but he took and executed the Office. The Name of King or Monarch denotes Sovereignty vested in a single Person, which *Oliver* really had, and was therefore really that, which those Words do signify; for he actually exercis'd Sovereignty in this Nation in a higher Degree, than did ever any of our Monarchs since the Conqueror. But is Allegiance due to a Sound, or Syllable? Is there any Law, that nulls the Acts of Kings, if they change their Style? If the King of *England*, whose Crown is Imperial, should assume the Style of Emperor, would all his Laws be null? Would he thereby forfeit his Crown Imperial? So he would, if he lost his Authority. *Majesty* was once as unknown to our Constitution, as *Protector*. The Kings of *England* were styled Lords of *Ireland*; yet as Lords, their Acts were valid; and when *Henry* VIII. took the Title of King, unknown to the Constitution of *Ireland*, were his Laws after-

afterward Null *ab Origine*? The Doctor is too judicious to insist on this Pretence for nulling the Acts of *Oliver*: If he had taken the Style of King, as he actually exercis'd the Office, his Authority and Right would have been still the same: The Usurping of a Word would not have made Legal all his other Usurpations; and it is morally certain, that if he had taken the Style of King, the Nation would not have acknowledg'd his Right to make Laws; and that after the Restoration, they would have sunk of themselves, as the Laws of an Usurper.

THE third Reason is, That *those only have been acknowledg'd for Kings for the Time being, who have been plac'd in the Throne by the States of the Realm, and recogniz'd by Parliament; whereas* Oliver *had not the Consent of the Three Estates; Two of the Three Estates, the Lords Spiritual and Temporal, had been long before laid aside; and it was no better than a Mock-Representation of the Third Estate, that made him Protector.* To this it may be answer'd,

First, as before, That *Oliver*'s Laws were Null, not because he was not advanc'd and recogniz'd by the States, but chiefly, because his Usurpation was opposite to the undoubted Right of the Lawful Heir. The Doctor's three Reasons are but one in Reality, (Title excepted) and one Reply is sufficient to confute them. But,

Secondly, There is no Law which declares, that *Kings for the Time being* must be necessarily *plac'd in the Throne, and recogniz'd by Parliament.* The Eleventh of *Henry* VII. makes no Mention of that Necessity; but supposes only in general, that Allegiance is due to the King for the Time being: The Words themselves imply only his Existence, not the Moral Causes, or Effects of it. And the Doctor hath cited no Authority of Law, nor produced any Reason to justify or support his Assertion: On the contrary 'tis notorious, that the Kings of *England* have Regal Authority, before a Parliament is called: Their Authority therefore is not the Product or Effect of Parliament.

Thirdly, Most of the Doctor's Kings in Fact were Kings in being for some time, before the Recognition of the Three Estates: It cannot be prov'd, That the Three Estates did constitute a Parliament, before the Middle or End of the Reign of *Henry* III. *Henry* V. *Henry* VI. *Richard* III. *Henry* VII. were Kings in being, and exercis'd

Regal Authority, before their Parliaments met: Thus Nine of the Doctor's Kings *de Facto* were not *plac'd in the Throne by the States.* *Edward* III. was set up by an Assembly, call'd and pack'd by an infamous Adulteress, when the King her Husband was in Prison. *Richard* II. was also in Prison, when the Parliament, call'd in his Name, depos'd him, and set up *Henry* I. 'Tis well known, who is *Caput, Principium, & Finis Parliamenti:* And the Doctor may please to resolve us, whether an Assembly is free, when the Head is imprison'd? and whether perfect Freedom is not necessary to a lawful Parliament?

Fourthly, Since Acts done without a Lawful Power, are Null *ab Origine*; the Doctor must allow, as he does, that the Three Estates have a Lawful Power to *place a King on the Throne*, as well as to recognize him, when he is plac'd: For if they have no such Power, their Placing a King is nothing; and cannot give Authority, which they have not. The Doctor understands not this of *Placing Kings on the Throne*, who have an Hereditary Right; but of Kings, who have it not: And then the necessary Consequence is, that the States have a Lawful Power of deposing Rightful Kings, to set up Kings *de Facto*; for they cannot place the one, without displacing the other. Thus one Parliament set up *Edward* III. by deposing his Father; and another, *Henry* IV. by deposing *Richard.* These two Powers have been always join'd in Fact, Dethroning, and Advancing; and if the Doctor will maintain, that the Three Estates have a Power to depose Lawful Kings, he may affirm it frankly; and he will find just as many Acts and Precedents for his Depositions, as for his Promotions: But if he will maintain, that the States have a Lawful Power to *place a King on the Throne*; but not to depose a Lawful King; he will maintain (with Submission be it said) a manifest Contradiction: For if the Deposition of a Lawful King, for want of Moral Power, is Unlawful and Null; he remains, as he was, a Lawful King, endu'd with Lawful Authority; but he hath no Authority, and is not Lawful, if another King is Lawfully plac'd on the Throne by the States, and invested with Lawful Authority: To create one King, is to destroy the other: Therefore they who have not a Power of Destroying, have none of Creating; and if

they

they will create, the Being they produce is Morally Nothing. In the Doctor's Opinion, *Charles* II. when dispossess'd, was Actually and Lawfully King, because *there was no King in Possession against him.* Does he think King *Charles* would have quitted the Regal Title, if *Oliver* had assum'd it? Be it so; but suppose the States conven'd had recogniz'd *Oliver*, as King; in that Instant, in the Doctor's Opinion, he would have had Regal Authority, and King *Charles* would have been deprived of it. But how could he have lost it in an Instant? By the States Authority of deposing him, of advancing and recognizing *Oliver.* Let any one, let the Doctor himself vouchsafe to consider well the Case, and give a tolerable Resolution of it. 'Tis this; One Week the States depose a Lawful King; the next they place Another on the Throne; the third they recognize him: The Difficulty is, how have the same States a Lawful Power to recognize and promote, if they have none to depose? 'Tis in vain to distinguish without a Difference; it seems absurd to make the same Power Null when it pulls down, and, when it sets up, Valid. Resistance, Deposition, Promotion, Recognition begin, advance, and finish Revolutions. Consent of the States and People legitimate All, or Nothing. The proper Way therefore of resolving Difficulties, is to begin with the first Acts; to examine whether Resistance and Deposition are lawful; then to consider, whether Subjects (such are the Three Estates) have a Moral Power, by their own Consent, to discharge themselves from their Allegiance to one King, and to give Regal Authority to another: If their Consent absolves them, they have a Lawful Power of Deposing; if not, their Consent is unlawful, and void; and hath no Moral Operation: It can neither deprive one King of Regal Authority, nor conferr it on another.

Defence, p. 118.

Fifthly, Since the Law hath declared, (a) *That neither both, nor either of the Houses of Parliament, have a Legislative Power, without the King*; it is hard to understand, how the Three Estates can give a Legislative Authority, which they have not, to a King, who hath it not; and that their Consent, which is no Law, can make a Lawgiver, and become a Law to all the Subjects, by laying the Obligation of Allegiance on them. Hitherto Men have been persuaded, that the Effect can have no more Power,

(a) 13 *Car.* 2. *c.* 1.

Power, than the Cause; and that none can give that, which he hath not.

Sixthly, Whereas Sovereignty is deny'd to *Oliver*, because he *had not the Consent of the Three Estates* of the Realm; this may raise another Difficulty: For if one of the Estates is excluded, (as in a Neighbouring Kingdom) then it seems, in the Doctor's Opinion, that a King so made hath in that Kingdom no Right to Sovereignty, and is not truly a *King for the Time being*: The Constitution, as to the Three Estates, in both Kingdoms, was the same; and it is hard to find a Reason, why if one Estate is lawfully excluded, so may not another; the Temporal, as the Spiritual Peers; for both have the same Right by the Constitution; and if Two of the Three may be excluded, so a Part of the Third, and so another Part, till the Three Estates are brought to a Rump, which may be also lessen'd, and at length wholly excluded; and so this Tail of a Distinction, by plucking out all the Hairs, will be reduced to nothing.

Seventhly, Tho' *Oliver* had not the Consent of the Three Estates Lawfully assembled, yet all the Estates, and the whole Body of the Kingdom liv'd quietly and peaceably under him; paid him Taxes; receiv'd Justice and Protection from him. He affirmed in a Speech to his first Parliament, That the Army, the City of *London*, all the Judges, Sheriffs, and Justices of Peace, the Grand Juries of several Counties, *nay all the People of England* had own'd him. The Majority of the Knights, Citizens, and Burgesses, elected by the People in his two Parliaments, sign'd a Recognition of him: His Establishment was so notorious, that all the Princes and States of *Europe* acknowledg'd him by Ambassadors. What follows? If the main diffusive Body of the People of *England* own'd him; this is surely equivalent to any Recognition of the Body Representative, or of the Three Estates; and the Whole being greater than a Part, the Authority of the Whole is greater in Proportion: The Consent of a whole People is of greater Value, than the Consent of a Senate. But it cannot be deny'd, that it conferrs at least as much Authority, according to the Law of Nature, and the Practice of Nations; and the Law of *England*, as is said, hath no where declar'd, That the Consent of Parliament can make *Kings for the Time being*,

Dugdale, p. 428.

being, or that in King-Making the Representers have more Authority, than the Body represented.

Eighthly, The Doctor himself, who excludes *Oliver*, because he had not the Consent of the Three Estates, hath employ'd two Chapters in his *View*, and as many in his *Defence*, to prove, that Subjection is due to Sovereign Power in Possession, by our Saviour's Decision about Tribute, and by the *great End and Design of Government*. He saith, that *our* LORD *doth determine the Lawfulness of Subjection to the* Roman *Emperor, for this one Reason; namely, that he was in Possession of the Government.* Subjection here must signify the whole Duty of a Subject to a Sovereign; or it signifies Nothing in this Dispute: And thus had *Oliver* a good Title to it; for he coin'd Money, and was as much in Possession of Sovereignty in *Britain*, as in *Rome Tiberius*. And King *Charles* in Exile *could not afford the Subjects of* England *any of the Benefits of Government; he could neither defend himself, them, nor his Right to govern them.* The Subjects therefore, according to the Doctor, were discharg'd from their Allegiance to the King who could not, and were bound to pay it to the Protector, who could, and did protect them. And if this is *agreeable to the great End and Design of Government*, it is agreeable to the Law of Nature. Suppose then, that Allegiance was not due to *Cromwell* by the Law of *England*; it was due by the Will of GOD, Natural and Reveal'd; by the Command of CHRIST, and the Laws of Nature; Laws superiour to the Law of *England*. If the Eternal Word hath spoken and decided, what Need of consulting the Oracles of *English* Law? If the Law Eternal of all Government requires Allegiance to Possessors, what Need of the Three Estates to Authorize it? Possession alone suffices; and according to the Doctor, Allegiance was due to *Cromwell, for this one Reason; namely, that he was in Possession of the Government.*

Defence, p. 139, 134.

Defence, p. 141.

THUS it appears, that the Doctor, against his own Reasons, gives *Cromwell* a Right to Subjection; and it appears not, that his Three Reasons have *dispatch'd* him: His Usurpation is still in full Force against the Doctor's System, and evidently refutes it; for if it requires Allegiance to *Cromwell*, to every one that gains Possession; it must be confessed, that the Royalists, who adher'd to the King against *Oliver*, were Rebels against the Ordi-

nance of God, were Transgressors of the Law of Nature, and the Command of Christ; and that there never was, nor can be any Usurpation; for that implies Possession, which, according to the Doctor, is a Divine Right to Government.

But the true State of the Controversy between the Doctor and his Adversaries, is, whether the Kingdom of *England* be, of Right, Hereditary? or, whether it belongs, of Right, to every one, who gets Possession? whether *the Kingdom appertains to Lawful Heirs, or Actual Possessors?* The Distinction between Possessors by Force, and by Consent, hath no Ground in Fact and History; for all Possessors, not Hereditary, have been always set up by Force; Consent of States and People hath followed; and it is morally impossible, it should be otherwise: They who promote, aid, or gain by a Revolution, will consent willingly, and all others by Necessity; tho' in all Invasions of Sovereignty in *England*, the Majority of the Nation hath been against them; yet the Less Party being stronger by the Possession of Power, hath forc'd the Consent of the Greater. Consent therefore is the Effect, not the Cause of Possession; which cannot be made Morally Good by the Evil it produces; nor cease to be Evil, as long as it is Invasion of the Undoubted Right of the Lawful Heir. The only Question therefore is, Whether Inheritance, or Possession, is by the Constitution the true Right to the *English* Monarchy?

Preface to Defence, p.8. 'Tis true, the Doctor acknowledges in plain Words, That the Crown is Hereditary; and he denies it to be Elective: But what Kind of Inheritance can he mean consistently with himself?

First, He asserts, that the *Inheritance may be limited by Parliament.* This I will not dispute; but it follows, that it is an Inheritance which may be taken from one, given to another, as often as the Parliament pleases; which seems to be an Inheritance very different from what is usually understood by Hereditary Monarchy; for it is truly Elective, since the Parliament chooses, or may choose the Successor always: And it is more Elective here, than in other Elective Kingdoms; for in all others the Elected have a Right for Life; in this a new one may be elected every Session.

Secondly,

Secondly, He maintains farther, That a King *plac'd on the Throne by the States of the Realm*, is a True and Lawful King *for the Time being*. He requires not, that his King should be of the Royal Family; he plainly declares, That if *Cromwell had had*, *what he had not*, the Consent of the Three Estates, *he would have been*, *what he was not* (*a*), a King for the Time being, with Legislative Power. Thus the Two Houses, without a King, can choose to this Hereditary Kingdom, and *place on the Throne* what Person they please, *Richard Rich*, *Oliver Cromwell*, or one of any other Family.

Def. p. 107.

Def. p. 104.

(*a*) *The Doctor cites Sir* T. Moore, *who affirm'd, in a ludicrous Discourse with* Rich *the Solicitor, that the Parliament can make a King, and depose him, and could make* Richard Rich *a Lawful King.* Defence, *p.* 5.

Thirdly, He affirms, (*b*) That either Queen *Mary*, or Queen *Elizabeth*, one or both, were Illegitimate, and yet had a Lawful Title. But (*c*) *a Bastard is of Blood to none in Law*, Nullius Filius, *and therefore cannot Inherit*. Thus, according to the Doctor, this Hereditary Crown is the Lawful Inheritance of those, who in Law have no Father, and therefore cannot Inherit.

(*b*) *See* Herb. Comp. Hist. *Vol.* 2. *p.* 183.

(*c*) *Sir* Hen. Finch, *second Book of Law*, *p.* 117.

Fourthly, He affirms farther, That it is our Saviour's Doctrine, that Subjection is due to Possession, and by the Law of Nature to Protection: The Hereditary Kingdom may therefore be Rightfully enjoy'd by a Commonwealth, a Rump, a Committee of Safety, or any other Power, that can get Possession, and afford Protection. Such is the Doctor's Hereditary Crown; if we collect his scatter'd Limitations, 'tis an Inheritance subject to perpetual Election of a King and Parliament, of the Two Houses alone; it may go to any Family, to no Heirs, to a Commonwealth, to any Power whatsoever.

THE Doctor, in his *Views*, could not avoid seeing evident Proofs, that the Crown of *England* was Hereditary; therefore he acknowledg'd it Verbally, and deny'd it Really, as utterly destructive to his System of Possession. He may understand Words as he pleases: But all other Writers of all Nations, and the Generality of all Men, understand by an Hereditary Crown, *a Monarchy entail'd on one Family, and descending successively to the Lineal Heirs of it*. Such are the Monarchies of *France*, *Spain*, *Portugal*, *Sweden*, *Denmark*, *Hungary*, and all other Hereditary Dominions in the World; such is the *English* Monarchy, govern'd successively above Nine Hundred Years by the same Royal Family, *which* (saith a great

Stillingfleet, Orig. Brit. *Pref. p. 72.* a great Author) *I believe hath the Advantage, in Point of Antiquity, above any other in* Europe, *and, as far as we know, in the World.* But if the most ancient Hereditary Family in the World, hath not a true Right of Inheritance; if Prescription of Nine Hundred Years is Nothing against new Possessors; there is surely no Right to Government at all, nor any true Right of Inheritance, Publick or Private; but every thing is every Man's; and Right, Prescription, Property, are Sounds without Signification.

But there have been many Interruptions in this Lineal Succession; some of them were made by the Cession of the next Heir; others by Testaments, which were thought to give a Lawful Right; others by Conquest; and others by a false Pretence of Inheritance: But Right hath been always pretended; and all notorious Violations of Right were condemn'd at the Time by all good Men, and rejected after by the whole Nation; which hath always restor'd the Rightful Heirs, as soon as it could shake off the Yoke of Conquerors and Intruders. The Species of Things is determin'd by their constant Nature, not by accidental Changes, how frequent soever: There have been many Changes in the Succession of *England:* Armies have set up Kings, who had no Right of Inheritance; Parliaments have confirm'd them; other Armies have dethron'd; other Parliaments have attainted them; and have declared the Entails of Parliaments Null. There have been divers Temporary Constitutions, if so they may be call'd; as the Constitution of Conquest, of Kings by Election, of Sovereignty in the Two Houses, of a Commonwealth, and lastly, of Protectors; every Power in Possession hath been the Constitution. But the Seeds of these Constitutions fell upon a Rock; forthwith they sprung up and flourish'd; but because they had not Root, they wither'd away; none of them liv'd so long, as to gain the Title of Prescription; one or two grew up to Maturity, and died; the rest perish'd in their Infancy. The Tree of Hereditary Right hath been several Times cut down to the Ground; *but the Stump of the Roots in the Earth* hath grown up again, and hath *reached unto Heaven. The Kingdom hath been sure,* and the Nation hath been convinc'd, *that the Heavens do rule.*

After

After the *Norman* Conquest, when the Government was quietly settled under *Henry* I; all the great Men of the Kingdom bound themselves by Oath, to the Succession of *Maud* his only Heir, *to whom alone* (as a good Historian affirms) *the Lawful Succession was due from her Grandfather, Uncle, and Father, all Kings; and from her Mother's Race for many Ages past.* By her Right succeeded *Henry* II. her Son, from whom all the Royal Family is descended; and He and all his Successors, for above Five Hundred and Fifty Years, have enjoy'd or claim'd the Crown by Hereditary Right; even those who had it not, did claim it; as *John*, *Henry* IV, *Richard* III, *Henry* VII: which seems an evident Proof, that our Constitution is Inheritance. In Morality 'tis thought a good Proof of the Natural Distinction between Right and Wrong, that the Worst of Men pretend to Justice, and would preferr Right, if by it they could compass their Desires: There have been often Competitors in *Poland*, about the Right to the Kingdom; All have claim'd by Election: The Constitution of *Poland* is therefore Elective. The Kings of *England*, who had not Hereditary Right, have claim'd it for many Ages; never was any King in *England*, who would not have preferr'd Hereditary Right to all other Titles; the Constitution of *England* is therefore Hereditary: But if Possession is Right; Birthright, and all other Rights are Songs and Fables.

Malmsb. Hist. Novell. f. 99. n. 40. Cui soli Legitima debeatur successio, ab Avo, Avunculo, Patre, Regibus, & a materno genere multis retrò seculis. *Vide.*

But if Prescription of Nine Centuries, if the continual Claim of Five Hundred and Fifty Years be nothing; what other Proof can be found more convincing? These Titles are indisputable in all other Hereditary Dominions; and a hard Undertaking it is, to persuade those, who will not be persuaded. However, reasonable Men may bear it, if Attempt is made to convince them by a Novel Law, and a Modern Constitution.

All Hereditary Titles, that were ever Receiv'd in this Island, were united in the Person of King *James* I. The Three Estates in Parliament acknowledging this to be an *inestimable, and unspeakable Blessing*, with the *Sacrifice of their unfeigned and hearty Thanks to Almighty* God, and *upon the Knees of their Hearts*, with this and much more Preamble, they humbly agnize the King's Indubi-

Act of Recognition, 1 *K.* James, c. 1.

table Right, and their own *most constant Faith and Obedience to his Majesty, and his Royal Progeny.*

THEY declare, That *immediately on the Decease of Queen* Elizabeth, *the Imperial Crown of* England *did descend to his Majesty.*

THEY acknowledge, That his Right to the Crown *is Inherent Birthright, and Lawful Succession, as being Lineally, Justly, and Lawfully next, and Sole Heir of the Blood Royal of this Realm.*

TO this Right they *faithfully submit, and oblige themselves, their Heirs, and Posterities for ever, until the last Drop of their Bloods* (their own, and all their Heirs for ever) *be spent.*

THEY *beseech his Majesty to accept the same, as the first Fruits, in the High Court of Parliament, of their Loyalty and Faith to his Majesty, and to his Royal Progeny, and Posterity for ever.*

THEY preface all this by affirming, *That they are bounden thereunto by the Laws of* GOD *and Man.*

TO put out of all Doubt the perpetual Obligation of this Law, in the Intention of the Legislators, they enact it, *as a Memorial to all Posterities, among the Records of Parliament for ever to endure.*

WHAT Law for the Declaration of Right can be found, in all the Codes and Pandects of the World, more express, more full, and comprehensive? How could they bind more strongly, themselves to the King, their Heirs to his Heirs, their Posterity to his Posterity for ever? They make the Hereditary Right, and the Obligation of the Subjects to it, as far as they can, immutable, and eternal: They affirm, it is establish'd by Law Divine, and Humane: The Right to the Crown is not Possession with or without Consent; it descended to King *James* before Possession, at the Instant the Queen died; so it is to descend by this Law to his Heirs for ever: The true Right is (not Possession, but) Inherent Birthright, Lineal Succession. Other Persons were then living, of the Royal Family; but the *Next* is declar'd to be the *Sole Heir:* The Crown is appropriated to the *Next Heirs* of the Royal Family for ever: The Three Estates vow Obedience and Loyalty to the King, and his Heirs by Lineal Descent; they debarr themselves and their

Posterity

Posterity from paying it to Others: They devote their own Blood, the *last Drop* of it, and all the Blood of their Heirs, to maintain the Lawful Succession against all Opposers: And to this Eternal Duty they are bound *by the Laws of* God *and Man.* The Vows and Acts of Fathers are suppos'd to bind their Posterity: The Three Estates presume, that they have a Power to bind Theirs; They affirm in this Recognition, That *the Court of Parliament is the whole Body of the Realm*; The Politic Body is the same Now as it was then; and every Member of it hath in Effect made the same Recognition; so that this Act, till the Society hath revok'd it Lawfully, lays the same Obligation on every Member of the Society, as if he had Personally consented to it. This Act is an Original Contract, made with the First King of this Line, and with his Posterity; the whole Nation obliges itself therein to the Heirs of this Family for ever; if before this Act of Recognition there were Disputes about the Right of Succession, here they are ended: After this Law, there cannot be any reasonable Dispute, to whom *the true Duty of Allegiance* is due, by *all Laws, Reason, and good Conscience*; for here it is declared, That the Three Estates, and all the Realm, are *bound by the Laws of* God *and Man*, to pay it to the Lawful Heir in the Order of Succession. 11 Hen. 7. c. 1.

And here it may be remembred, that the Right of Inheritance, established so fully in this Act of Recognition, is again more briefly, but as effectually declared in the Act of *Charles* II. wherein it is affirmed, in Opposition to all Usurpations, That the Imperial Crown of these Realms, appertains *by Just and Undoubted Right*, to the King, and to his Heirs and Lawful Successors. As the undoubted Right was in King *Charles*; so after him in his Lawful Heirs: As the Crown appertain'd by Law to him, when he was out of Possession; so it must be understood to belong to his Heirs and Lawful Successors, if they should be out of Possession also. By the Act of King *James*, Birthright is declar'd to be the perpetual Right to the Crown: In this Act of *Charles* II. it is affirm'd to be the undoubted Right, even when others are in Possession. Neither of these Acts are expresly repeal'd; and both together seem to make an impregnable Proof, that Heredi- 12 Car. 2. c. 12.

tary

tary Right was by Law the only Right to the Crown of *England*.

AGAINST the positive Determination of Law, 'tis in vain to object the Pleadings of Apprentices in Law, and even the Sayings of great Lawyers, disprov'd by great Lawyers, and contradicted by themselves in their undoubted Works. In a great Case debated and resolved by a Lord Chancellor and Twelve Judges, (*a*) the Rules of Succession, *in Cases of the Crown*, are cited as *known Principles and Maxims* of the Common Law, *against which there never hath been, nor ought to be any Dispute. Descent* is affirm'd to be *an* (*b*) *undoubted Title made by Law*; And Allegiance is declared to be due, not to the (*c*) *Crown or Kingdom*, but to the *King*, even when he is (*d*) *driven out of his Kingdom*. If Lawyers notwithstanding will contradict the Principles of Law, the Right of Descent, and Duty of Allegiance, can their Contradiction destroy them? The Sayings and Sentiments of Lawyers must be judged of by Law, which is the adequate Rule of Moral and Civil Action; and if Law is not a clear Rule about the Right to Sovereignty, this Dispute can have no Determination; the Opinion of Lawyers can neither indemnify Men in this World, nor secure them from Damnation in the other.

(*a*) *Speech of the Lord Chancellor* Ellesmere, *touching the* Postnati, *p.* 36.
(*b*) Ibid. *p.* 68.
(*c*) Ibid. *p.* 99, &c.
(*d*) *Lord* Ellesmere *and Sir* Francis Bacon, *See* Appendix, N° ix.

Much less is this Controversy to be determin'd by Facts and Precedents, which, how frequent soever, must be justified by Law: For Actions are not Lawful, because they are done and recorded; but because they are conformable to Law: And it is certain, that Injustice, publick and private, hath more Precedents, and fills History more, than Right and Justice. King *Stephen* enjoy'd the Kingdom by Perjury, Fraud, and Violence; *Edward* II. was depos'd, and cruelly murder'd; *Edward* III. a *Minor*, was set on his Father's Throne before his Time; *Henry* IV, contrary to his Oaths, and his Engagements with his own Party, depos'd and murder'd his Sovereign, and assum'd his Crown; *Richard* III, besides many other Horrible Murders, kill'd the King and his Brother, and took their Inheritance; *Henry* VIII. fix'd and unfix'd the Succession, as suited his Lust and Pleasure: A Parliament rais'd a Rebellion against the best of our Kings, by his own

own Authority; a Part of it Depos'd and Murder'd him: A Commonwealth was set up; and an Officer assum'd the Sovereignty, and transmitted it to his Son and Heir: These were Impious and Tragical Actions, of which the Actors have been, and are, and will be condemn'd, by all good Men for ever. Dr. *Higden* cannot possibly approve them; yet by several of these, and such Precedents as these, He justifies his Opinion, *That Possession with Consent is Right*: Tho' the Possession hath been extremely wicked, and the Consent to Wickedness extreme Iniquity. He could find no Precedents, in which there was not a long Chain of Wickedness; Perjury, Rebellion, Invasion, Deposition, Murder, and Possession; he hath collected out of History the greatest Crimes, and call'd them the Constitution: The Bulk of his Proof is, That there have been unjust Possessions, justify'd by Pretence of Consent and Law, which ever have been, and will be the Effects of unjust Power and Possession. A Divine might have consider'd, what hath been often urged, and seems unanswerable; That Unjust Possession obliges to Repentance and Restitution: And that no Man can have a True Right to what he is bound to Restore; nor can others be oblig'd to Maintain him in it.

THE Doctor, no doubt, had read and consider'd *The true and exact History of the Succession.* If that History is not what it pretends to be, the Doctor would have oblig'd the World by refuting it; but if it be really *true and exact*, as it is generally esteem'd to be; it is undoubtedly a full Refutation of the Doctor's Opinion: Here it hath been Attempted to prove, that his Opinion makes the most unjust Possession (as was *Oliver*'s) rightful; and destroys the Hereditary Right, so long Establish'd by the Constitution; and if the Doctor hath not sufficiently guarded his Opinions against these Objections, they seem evidently to Overthrow it.

By Dr. Brady, *printed* An. 1681.

BUT because Books not particularly Answer'd, are boasted as Unanswerable: And because it may be of Service to the Publick, and to Truth itself, to vindicate our Law and History from the Mistakes

of the Reverend Doctor, the Author of the following Work hath taken the Pains to follow him thro' all his Labyrinth: And, to make the Way thro' it more easy, he hath examin'd, in the Order of Time, all the Historical Facts produced by him; hath refuted his Arguments and Comments upon them, and rectify'd his Errors about the *English* Constitution: And the best Commendation of this Treatise is, to desire the Reader impartially to examine it.

THE

THE HEREDITARY RIGHT OF THE Crown of England ASSERTED, &c.

THE Doctor's Design is to prove, That, by the *Constitution* of *England*, whoever is fully possess'd of the Crown and Government of it, has an undoubted Right thereby to be acknowledg'd and obey'd as a Lawful King; that is, he manifestly affirms, That whoever is King *de Facto*, is by Consequence King *de Jure* too. And in his first Chapter, he undertakes the Defence of this Doctrine, from the known Customs, and uninterrupted Practices; that is, from the *Common Laws* of the Realm. Let us now see, how he manages his Argument. *The People of* England (saith he) *always submitted and took Oaths of Fidelity to the Thirteen Kings, who from the Conquest to King* Henry VII. *came to the Throne without Hereditary Titles, as well as to the Six HereditaryKings, who reigned in that Period; and this so universally, that I don't know, there are any* Non-Jurors *to be found in those Reigns.*

By *Hereditary Kings*, it is here evident, the Doctor means only such, as held the Crown by *Proximity of Blood*; and consequently by those, whom he affirms to have had no *Hereditary* Right, we are to understand such, as placed

placed themselves in the Throne, when others, who had a nearer Relation to it by Descent, were living. But the Doctor should have known, that the Word *Hereditary* had a different Signification, than what he has assign'd to it, in our Ancient Writings. For *William the Conqueror* (*a*) styles himself King *Edward*'s *Heir*; and calls the Crown of *England* his *Inheritance*: And his Son King *Henry* I. (*b*) affirms, That his Father succeeded by Right of Inheritance; and the same Assertion may be met with in (*c*) *Guil. Pictaviensis*, and (*d*) *Ordericus Vitalis*. Why therefore must the *Conqueror* be expunged out of the List of Hereditary Kings, when there is so good Authority to keep him in? Surely He very well knew, as did the Historians cited upon this Occasion, that he was not the next of Kin to King *Edward*; and yet we see, they did not think it an Absurdity to maintain his *Hereditary Title*: Nor certainly is the Doctor ignorant, that many of his Friends have lately taken it very ill, that the Word *Hereditary* should be appropriated only to such, as succeed by *Proximity of Blood*. The Truth is, a Successor by *Will* is an *Heir* in the Language of the *Civil Law*; and therefore *William the Conqueror*, claiming by the *Testament* of King *Edward*, might justly be said to have an *Hereditary Title*: But this is a Point I shall not much contend for; and therefore if the Doctor thinks fit to insist upon it, I am willing to allow him his Catalogue of Non-Hereditary Kings, in the Sense he is pleased to understand that Expression: But then he must pardon me, if I think this Concession will do him no manner of Service. For it is here proper to remember, what the Doctor thought fit for his Purpose to acknowledge in his (*e*) *Defence*; That the Question between him and his Adversaries, is about *the Duty of Subjects*, whether they are to pay their *Allegiance* to all Princes, that can fix themselves in the Throne, or only to those, who are Lawful Kings, independently of their Possession. The first they deny; and the latter only they think capable of a Defence: But surely they do not allow it to be a just Consequence from this Position, That they must never submit to Princes, whose Titles are not supported by *Priority of Birth*, or *Nearness of Blood*; which yet the Doctor takes for granted, and builds upon, as an uncontested Principle

(*a*) *See his Charter in Dr.* Hickes's *Dissert. Epist.* p. 72.

(*b*) *See his Charter in Mr.* Selden's *Notes on* Eadmerus, *p.* 211.

(*c*) *P.* 200.

(*d*) *L.* 2. *p.* 492.

(*e*) *P.* 21.

Principle throughout this whole Controversy. I must beg Leave therefore to say, that he has very inauspiciously, at the Entrance of his Discourse, mistaken the true State of the Question; for instead of proving, that the People of *England* have all along own'd the Authority of Princes, who had no other *Title*, but what they deriv'd barely from Possession; which was his only proper and necessary Business; he has been pleased to amuse his Reader with an Assertion (the Truth of which was never yet called in Question) That many of our Kings, since the Conquest, were generally esteemed *Rightful Successors*, tho' they were not the next Heirs, by Blood, to the Crown.

I WOULD explain myself a little more particularly upon this Article; because I find it has been thought of Moment by the Friends to the Doctor's Hypothesis. He is pleased to affirm, *That the People of* England *always submitted and took Oaths of Fidelity to the Thirteen Kings, who, from the Conquest to* Henry VII. *came to the Throne without Hereditary Titles*; that is, who were not *Heirs* by immediate Descent to the Crown; and from thence he draws this Conclusion, That whoever is in the Throne, has, for that sole Reason, though he should be destitute of all other Pleas and Pretences, a sufficient Right to the Obedience of the Subjects. But surely this Consequence cannot possibly be admitted; unless it is also evident, that where a Title by Birth is wanting, that Defect can no otherwise be supplied, but by *Possession*: For if it should appear, that much better Reasons may be assign'd for this Obedience, which was paid to the Doctor's Non-Hereditary Kings; he will then be forced to confess, that his Argument has fallen short of his Purpose. I would therefore intreat him to consider, *First*, Whether in this *Hereditary* Monarchy of *England*, there was not anciently a Power in the Crown, to interrupt and limit the Lineal Succession, by the Exclusion of the Right Heir. *Secondly*, Whether the Consent and Cession of the *Rightful* Heirs, are not sufficient to convey a Right to Princes, who wanted a Title by Proximity of Blood. And then, *Thirdly*, Whether it is not possible, that the general Submission and Obedience, which was paid to several of those Thirteen Kings, who are said by the Doctor to have had no Hereditary

Right, might be the sole Effect of these Motives and Principles.

First, I ask, Whether in this *Hereditary Monarchy of England*, there was not anciently a Power in the Crown, to interrupt the Lineal Succession, by the Exclusion of the *Right Heir?* The Doctor makes no Question, but this has been an undoubted Part of the Prerogative of our Modern Kings, with the Consent of Parliament; and assures us, *(f)* it was a Doctrine universally admitted by all Parties in *Henry* VIII's, and Queen *Elizabeth*'s *Reigns*. Now I look upon this as a good Ground for *Presumption*, that their Predecessors had the same Authority; for there is Reason to believe, that whatever considerable Branches of Sovereignty have been exercis'd by Princes in these latter and declining Ages of the Monarchy, were as amply at least, if not in a more eminent Degree, enjoy'd by their Royal Progenitors. But I need not rely upon Conjectures, when it appears from the Testimony of our Historians, that it was the usual Custom, *i. e.* the Common Law, in the Times nearer the Conquest, for our Kings to dispose of their Crowns, as they thought fit, without regard to *Proximity* of Blood; and their Method of doing this, was by their Last Wills and Testaments. *(g)* Dr. *Brady* has by several Instances shew'd, that this is no groundless Opinion; but if I mistake not, he has omitted an Authority, by no means to be forgotten upon this Occasion: It is a Passage in *Guil. Pictaviensis*, (who had been Chaplain to the Conqueror, and is mention'd by *Guil. Gemmeticensis*, and *Ordericus Vitalis*, as a Person of undoubted Credit) in which he *(h)* tells us, That upon the *Conqueror's* Landing, *Harold* sent a Messenger to him, to inform him, that *King* Edward the Confessor, *at the Time of his*

(f) See his Defence, p. 9, &c.

(g) History of Succession. Ethelwulphus paucis ante mortem mensibus *Testamentum* fecit, in quo Regnum divisit inter Ethelbaldum & Ethelbrithum Filios suos. W. Malmsbur. de gest. Reg. Ang. l. 2. c. 2. p. 22. Tunc jussu Patris in *Testamento*, Athelstanus in Regem acclamatus est. Idem ibid. l. 2. c. 6. p. 27.

(h) Guil. Pictaviensis, *p.* 200. *The Words of* Harold's *Messenger to the* Conqueror. Hæc tibi mandat Rex Haroldus; Terram ejus ingressus es, quâ fiduciâ, quâ temeritate nescit. Meminit quidem, quòd Rex Edwardus te Anglici Regni Hæredem fore, pridem decreverit, & quòd ipse in Normaniâ de hâc Successione Securitatem tibi firmaverit. Novit autem jure suum esse Regnum idem, ejusdem Regis Domini sui dono, in extremis illius, sibi concessum. Etenim ab eo Tempore, quo B. Augustinus in hanc venit Regionem, communem gentis hujus fuisse consuetudinem, Donationem, quam in ultimo fine suo quis fecerit, eam ratam haberi. Quapropter de Terrâ justè suâ cum Tuis te regredi postulat, &c.

Death,

Death, bequeathed his Crown to him; and therefore whatever Claim the Duke of Normandy *pretended to it, it could be of no Authority; because it had been the constant Practice in* England, *ever since the Coming hither of S.* Augustine, *that Donations made at the Point of Death were always held good and valid.* From whence it is evident, that this Power of the Crown was universally (*i*) acknowledg'd in those Days; since the Claims of both *Harold* and the *Conqueror* were founded upon it; and the Dispute between them was only, which *Donation of King* Edward should have the Preference, without calling in Question his Authority to make them.

I PROCEED now to the Second Query I would recommend to the Doctor's Consideration; and that is, Whether the Consent and Cession of the *Rightful* Heirs, are not sufficient to convey a Right to Princes, who before had no *Hereditary Title?* This I take to be a Point, which the Doctor will not be forward to dispute; (*k*) for it was never yet doubted, but Princes might part with their Rights, as well as common Subjects; and preferr a private Life, before the Burden of a Crown. And when such Resignations have been made openly, and the Subjects have had reason to believe them free, and *bonâ fide*, whether by direct and express Terms, or by Actions, which sufficiently implied them; the *Possessor* of the Throne, who is next in Blood, does then certainly acquire a Power and Authority, which sufficiently justifies all his Acts of Government. It is true, by the Judgment given in the House of Peers upon the Claim of *Richard* Duke of *York*, it was declared, That the Resignations, without Consent of *Parliament*, did not oblige the Makers of them; but this seems to have been the first Time, when this Doctrine was publickly establish'd; and therefore in all former Surrenders by the Right Heirs, it does not appear, that their Validity was ever question'd, though they were not performed in the great Council of the Kingdom.

(*i*) Mezeray *tells us, it was the ancient Custom for the Kings of* France *thus to dispose of the Succession by their last Wills and Testaments. At the End of* Clothaire, 2 *Tit.* Mœurs & Coustumes. *Thus King* John *pretended the* Donation *of* Richard I; *and* Henry IV. *challenged the Realm, not only by Conquest, but also because He, by King* Richard, *was adopted as Heir.* Holinshead's Chron. *p.* 511.

(*k*) Similis est Quæstio, an abdicari possit Regnum, aut jus succedendi in Regnum. Et quia pro se quisque abdicare possit, non est dubium. Grotius de Jure Belli & Pacis, l. 2. c. 7. sect. 26.

AND

AND thus I have made my Way to the next Query I would propose to the Doctor; and that is, Whether it is not possible, that the general Submission and Obedience, which was paid to several of those Thirteen Kings, who are said to have had no *Hereditary Right*, might be wholly occasioned by these Motives and Principles? I am at present only concern'd for a bare Possibility of the Influence of those Reasons in the Cases in Question; because when once that is allowed, the Doctor's Constitution will still remain to be proved; and consequently we are not advanced one Step in our Discoveries of the mighty Virtue and Efficacy, which attends the Possession of a Throne; tho' we should grant him all his List of *Non-Hereditary* Kings, for which he so earnestly contends. But tho' I might content myself with referring this Matter to the Doctor's farther Consideration; and wait for better Reasons, than he has yet produced for the Support of his Assertion; I shall in the mean while endeavour to satisfy him, that the *Conqueror*, and some of his Successors, did not depend wholly upon their *Possession* for their Title; but had both those Pleas on their side, which I just now mentioned; *viz.* The Nomination of their Lawful Predecessors, and the Consent of the next Heirs; and if these were good Reasons, upon which a Claim to the Crown might be founded; they were certainly sufficient to justify the Subjects in paying them their Allegiance.

I BEGIN with *William the Conqueror*; and shall presume to affirm, That he was a Lawful King; *First*, Because King *Edward the Confessor* had appointed him his Successor, which in those Days was thought a Legal Way of disposing of the Inheritance of the Crown, as I have already shewed. For the Truth of this Assertion I have all imaginable Assurance; since it is unanimously attested by all the Writers, who flourish'd in, or near the Conqueror's Reign. (*l*) *Guil. Pictaviensis* tells us, That King *Edward* loved the Duke of *Normandy* as his Son, and did not only declare him his Heir, but obliged *Harold* to swear to his Succession. *Ingulfus* (who had been

(*l*) Guil. Pictaviensis, p. 191. R. Edwardus Ducem Gulielmum Hæredem suum statuit, quem loco Germani aut Prolis adamabat; & ergo fidem Sacramento confirmaturum Haroldum destinavit, &c. Et vide p. 181, 191, 200, 205.

Secre-

Secretrary (*m*) to the Conqueror in *Normandy*, and was afterwards in great Favour with him in *England*) informs us, (*n*) That *King* Edward *being much weakened with Age, and perceiving* Edgar Atheling *to be unfit for the Royal Throne, as well by the Qualities of his Mind, as those of his Body*, &c. *appoints* William *Count of* Normandy *his Successor, and sends* Robert *Archbishop of* Canterbury *into* Normandy, *on purpose to acquaint him with it:* And he assures us likewise, that *Harold* swore to maintain that *Act of Settlement*. The same thing is fully related by *Wilhelm. Gemmeticensis (Hist. Norm. l. 7. c. 31.)* who flourish'd in the *Conqueror*'s Reign. And *Ordericus Vitalis*, an Historian of good Credit, who lived in those Times, agrees with these Writers in the Account he gives of this Matter; (*l. 2. p.* 492.) (*o*). I forbear multiplying Citations to this purpose; what I have already produced being abundantly sufficient to satisfy those, that are willing to be satisfy'd, that we have the concurring Testimony of many unexceptionable Authors, to prove the *Conqueror*'s Right, by the Nomination of King *Edward*. Besides, this was no rash inconsiderate Act of the *Confessor*, nor the sole Effect of his own Will and Pleasure, without the Advice of his great Men and Counsellors; on the other hand, we find it ratified by the express (*p*) Assent

(*m*) Ingulf. Hist. p. 73, 74. & Ord. Vitalis Hist. Eccles. l. 4. p. 542.

(*n*) Ingulf. p. 68. Rex Edwardus Senio gravatus, cernens Clitonis Edwardi nuper defuncti filium Edgarum Regio Solio minùs idoneum, tam corde quàm corpore, Godwinique Comitis multam malamque Sobolem quotidie super terram crescere, ad Cognatum suum Wilhelmum Comitem Normanniæ animum apposuit, & eum sibi succedere in Regnum Angliæ voce stabili sancivit. ----- Hinc R. Edwardus Robertum Archiepiscopum Cant. (utpote Normannum) Legatum ad eum à Latere suo direxit, illumque designatum sui Regni Successorem, tam debito cognationis, quàm merito virtutis suæ, Archipræsulis relatu insinuavit. Ad hoc Haroldus Major domûs Regiæ veniens in Normanniam, se Wilhelmo Comiti, post Regis obitum, regnum Angliæ conservaturum juravit, &c.

(*o*) *I might have added more Testimonies out of* Eadmerus, *the* Chron. Saxonicum, Brevis Relatio de Wilhelmo primo Rege, *publish'd by* S. Taylour, *at the End of his Book, about* Gavelkind; *also from* William *of* Malmsbury, &c. *I do not mention the* Fragmentum ex Libro Cadonensi de vitâ Gulielmi primi, *printed by Mr.* Camden *in his* Anglica & Normannica, *because it is indeed nothing else, but a broken Transcript from* Ordericus Vitalis, *as will evidently appear to those, who compare it with that Historian*, Lib. 7. p. 647, 656, &c. *Mr.* Camden (*in his Epistle to Sir* F. Grevill *before his* Anglica & Normannica) *fancied it was a Piece of* Guil. Pictaviensis; *but that Mistake was very excusable*, Ordericus *being not then printed.*

(*p*) Edwardus igitur *Optimatum suorum assensu*, per Rodbertum Cantuar. Archipræsulem hujus delegationis Mediatorem, obsides potentissimæ parentelæ Godwini Comitis filium & nepotem ei direxit. Guil. Pictav. p. 181. & p. 200. *He tells us, that the Conqueror sent this Message to* Harold, *That he was declared Successor by King* Edward, non sine suorum Consensu, verùm Consilio Stigandi Archiepiscopi, Godwini Comitis, Leutici Comitis, Sigerdi Comitis, qui

of his Nobility, and the People of *England*; and this was notified to the Duke of *Normandy* by the Archbishop of *Canterbury*, in a particular Embassy for that purpose, as I before observed. So that it must be looked upon as a publick Act of the whole Kingdom; and had all the Authority, which the deliberate Concurrence of the People with the Desires of the Prince, could possibly give it; and a better, I presume, the Doctor will not think necessary. And whoever well considers the Citations in the Margin, and takes notice of the *Conqueror*'s Appeal to the Laws of *England* for deciding the Quarrel between him and *Harold*, cannot reasonably believe, he would have put his Cause upon that Tryal, if the Constitution had not been manifestly on his side. It may indeed be objected, that King *Edward the Confessor*, having no good Title to the Crown himself, could not convey one to the Duke of *Normandy*; and this I readily allow, if by a good Title we are to understand *Proximity of Blood*; which he most certainly wanted; for the Issue of *Edmund Ironside*, Elder Brother to King *Edward*, had undoubtedly a better Claim in this respect, some of which were living in King *Edward*'s Reign. But I desire it may be considered, that when the *Confessor* entred upon the Throne, the Issue of *Edmund Ironside* were in a remote Country; and that by no Fault of King *Edward*, who had been driven himself into *Normandy* by the same Violence, that forced them into *Hungary*. So that in that Juncture, when the Right Heirs were at a great Distance, their Conditions and Circumstances utterly unknown; and besides it was hardly possible to give them Notice of the Vacancy of the Throne, or receive their Answer within any reasonable Space of Time; either there must have been no Government in *England*; or else it must be confess'd, King *Edward* had good Cause to take it upon him, having a Prior Title to any one else then in *England*. If it be said, He was however an *Unjust Possessor*; his Nephews by his elder Brother being living, to whom he

qui etiam jurejurando suis confirmaverant, quòd post *Edwardi* decessum me reciperent Dominum, &c. *And upon this Ground it was, that we find the Conqueror appealing* (ibid.) *to the* English *Laws for Justice against* Harold. Præsto ego sum ad agendam causam contra Haroldum *in judicio, sive placet illi juxta Jus Normannorum, sive potiùs Anglorum.* Et vide W. Malmsbur. L. 3. p. 56. Ingulfus *says*, (p. 68.) *That King* Edward *appointed the Duke of* Normandy *sibi* succedere in regnum *Angliæ stabili voce.* Et Ord. Vitalis, Lib. 2. p. 492. *affirms, That this was done* Consentientibus Anglis.

†

ought

ought to have resign'd the Crown; I answer: That when Histories are silent, it does not become private Men to be forward in passing Judgment on the Actions of Princes. The Authors who have transmitted to us an Account of *Edward*'s Reign, say nothing upon this Subject; either that the Descendents from *Edmund Ironside* laid Claim to the Crown; or that King *Edward* discovered any Inclination to do them Justice, at least till the (*q*) Eleventh Year of his Reign: But it may possibly be unreasonable from thence to inferr, that all that Time he was a wrongful Possessor; because Cases may be supposed of Princes, who for Want of Power and Opportunity of doing Right to the *Lawful* Heir, are forced to endure the Burden of a Crown, which they would readily and gladly ease themselves of, upon a proper Occasion. As, when the Rightful Heir is Abroad, in a distant Kingdom, and perhaps at the Disposal of a Foreign Prince, on whose Will and Pleasure his Return to his Country chiefly depends. When the Possessor of a Throne has this to plead for himself, (which may be true of King *Edward*, for any thing that can be alledg'd to the contrary) I may appeal to the severest Interpreters of the Actions of Princes, whether the Exercise of Royal Power in such Circumstances, can be charged with *Usurpation*; or as some choose rather to express themselves, whether such a Person is only a King *de Facto*. For it is not the bare Act of Seizing and Filling a *Throne*; but the Will of the Possessor, that must denominate him an *Usurper*. He that invades another's Right, with an Intention to detain it from him, and a Resolution never to restore it to the true Proprietor, is certainly guilty of the highest Injustice: But if he accepts of a Crown, only that he may secure it to the Right Owner, and the better disappoint the Designs of his Enemies; most certainly he obliges him by a very extraordinary Act of Friendship. In a word, by the Character transmitted to us of King *Edward*, he had neither Ambition enough to desire a Crown, nor so great a Love for State and Grandeur, as to be unwilling to part with it. When *Hardecnute* died, and the People of *England* wish'd for nothing more, than that *Edward* might be Successor; it was not without (*r*) some Importunity, that he vouchsafed to be their King. And since he

(*q*) Flor. Wigorn. p. 416. Ed. 4°.

(*r*) W. Malmsbur. de Gest. Reg. Angl. l. 2. c. 13.

he is repreſented to us, as a ſtrict Lover of Juſtice throughout his Reign; and his Placing *Malcolm* in the Throne of *Scotland*, in the Room of the Uſurper *Macbeth*, is recorded as a conſiderable Inſtance of it; it will not become us eaſily to believe, he was guilty of that Crime himſelf, which he ſo ſeverely puniſh'd in another. In the Eleventh Year of his Reign, as I obſerv'd, he ſent an Ambaſſador purpoſely to the *Emperor*, that his Deſire of ſeeing his Nephews in *England* might be intimated to them, in order to their Poſſeſſion of the Crown of it; but this Embaſſy had no Effect till (*s*) three Years after, when we firſt hear of their Arrival; a plain Indication, that either the King of *Hungary* was unwilling to part with them, or they themſelves were very little affected with the Offer of a Crown: For what other Reaſon can be aſſign'd, why they ſhould ſo long deferr their Compliance with King *Edward*'s kind Invitation? At length, however, we find them ſafely landed in *England*; and now it will perhaps be expected, that the *Confeſſor* ſhould immediately make a Tender of his Kingdom. But the ſudden Death of Prince *Edward* (which happen'd within a (*t*) few Days after his Arrival) would have prevented the Execution of ſuch a Deſign, had it really been intended; and his Children were yet too young to be truſted with the Government. So that all things duly conſider'd, I ſee no Reaſon for the Sentence which has been ſo peremptorily paſs'd upon *Edward*, as an *Uſurper*. I confeſs, the Nomination of the Duke of *Normandy* for his Succeſſor, whereby his Nephew *Edgar* was manifeſtly excluded, ſeems to be a very plauſible Objection againſt all I have ſaid in his Vindication; for how could he be diſpoſed to do his Kinſman Juſtice, when it is plain he diſinherited him? To this I anſwer; *Firſt*, That whoever duly conſiders the Circumſtances of thoſe Times, the Power and Ambition of *Harold*, with the Condition and Qualities of *Edgar Atheling*; will be quickly ſenſible, that his Uncle

(*s*) Ran. Higden Polychron. ad A.D. 1055. Rex Edwardus miſit Aldredum Wigorn. Epiſcopum ad Imp. Hen. ſecundum, rogans eum, ut miſſis apud Hungariam epiſtolis fratuelem ſuum *Edwardum* filium Edmundi ferrei lateris, Angliam inde tranſmitteret: decreverat enim Rex eum conſtituiſſe hæredem ſuum in Angliâ; ſed tertio poſt hoc anno Angliam veniens obiit Londini.

(*t*) *This is unanimouſly affirmed by all the Authors, that write concerning thoſe Times.*

did

did not mean him ill, in denying him a Crown, which he could easily foresee he would never be able to enjoy. When King *Edward* died, he was too (*u*) young to do the Office of a King; a Circumstance undoubtedly not unthought of by the *Confessor*, who had Reason to be apprehensive, that it might so happen; and then a fair Opportunity would be offer'd to the Sons of *Godwin*, of making themselves Masters of the Kingdom, which he knew they had long aspir'd after. Now it is evident, from all the Histories of this Prince, that he intended nothing more, than to disappoint the ambitious Projects of that Family, which he (*x*) entirely hated; and therefore took all Opportunities of humbling them. This is assign'd as a Reason, why he had never any Carnal Knowledge of his (*y*) Queen; (though otherwise a Lady that wanted no Charms, and is much celebrated for her exemplary Vertues) for we are told by very (*z*) grave Authors, that it was commonly believed, his Aversion to the Brothers begat in him that Resolution, never to have any Children by the Sister. He had not been long upon the Throne, when *Godwin and his Sons* (*a*) made him sufficiently sensible of their Power, by obliging him to come to a Composition with them; from whence it was evident, what was to be expected after his Decease, should a young, unactive, and irresolute Prince pretend to succeed him. This Consideration made him cast his Eyes first on (*b*) the Duke of *Normandy*, as the only Person capable of defeating the Designs of *Harold*; but especially after (*c*) the Death of his Nephew *Edward*, the Father of *Edgar Atheling*; for then it was he enter'd into a strict Alliance with Duke *William*; and made it his Business to secure to him the Crown.

(*u*) Ailred. Rievallensis, p. 366. *says, He was a Boy at King* Edward's *Death; and mentions that as a Reason, why the* English *would not have him for their King.* Puer tanto honore minùs idoneus videbatur.

(*x*) Ingulfus, p. 68.

(*y*) *She was* E. Godwin's *Daughter.*

(*z*) Ail. Rievallensis, p. 378. Will. Malmsburiensis de Gest. Reg. Ang. L. 2. c. 13. p. 45.

(*a*) Chron. Saxon. ad A. D. 1048.

(*b*) *Edgarum Adeling* Sanctus Rex Edwardus, dum postmodum regnaret pro filio nutrivit, & hæredem Angliæ instituere cogitavit; sed filios *Godwini*, ac Gentis suæ nequitiam formidans, *Willielmum Nothum* avunculi sui filium adoptavit. Brompton. Chron. p. 908. & vide pag. 945. & Ingulf. p. 68.

(*c*) Rex itaque defuncto cognato (sc. Edwardo Principe) quia spes prioris erat soluta Suffragii, *Willielmo Comiti Normanniæ* Successionem Angliæ dedit. Erat ille hoc munere dignus, præstans animi Juvenis, & qui in Supremum fastigium alacri labore excreverat. Will. Malmsbur. de Gest. Reg. Ang. L. 2. cap. ult. p. 52.

But there was one thing farther, which contributed most to determine King *Edward* in this Choice of a Successor; and that was, the very mean Genius, and manifest Inabilities for Government, he observ'd in his Nephew *Edgar*; for besides his Incapacity, by Reason of his Age, he had the Misfortune to want a due Proportion of those common Endowments of Mind, which were indispensably requisite, at that Time especially, to support him upon the Throne; through which Defects in his Understanding, he must soon have fallen a Sacrifice to those, who aimed at the Crown. This is attested by so good Authority, that it cannot reasonably be doubted of: (*d*) *Ingulfus* expresly assures us, that this was the chief Reason, why King *Edward* refused to name *Edgar* his Successor; *viz. Because he perceived him to be unqualified for the Crown, as well by the Infirmities of his Mind, as those of his Body.* But (*e*) *William* of *Malmsbury* gives us his Character in plainer Terms; *By reason* (says he) *of his unactive, and lazy Disposition, and* (*to use a softer Term*) *his Simplicity, he became contemptible: And after having been for some while the Sport of Fortune, he is now spending the short Remainder of his decrepid Age, privately, and dishonourably in his Country-Retirement.* Now I do not mention these Particulars, as if I thought his Qualities, how mean soever, could destroy his *Hereditary Right*; but only to shew, that these were esteemed good, and sufficient Reasons, even by his Friends, who were most concern'd for his Interest, to keep him out of the Throne; to which how just soever his Title was, his Uncle thought it would be a better Proof of his Affection to him, to leave him in the Condition of an eminent Subject, than that of a Titular King, which was the most could be expected. If I should add, that *Edgar* was sensible, it was his Interest, to decline the Possession of the Crown, and therefore complied with his Uncle's Settlement of it; I should not want Reasons to

(*d*) Ingulfus, p. 68. R. Edwardus senio gravatus, cernens *Edgarum* Regio solio minùs idoneum, *tam corde quam corpore, Godwinique* Comitis multam malamque Sobolem, &c.

(*e*) Will. Malmsbur. p. 103. Pedetentim pro ignaviâ & (ut mitiùs dictum sit) pro Simplicitate contemptui haberi cœpit. Quantula enim Simplicitas ut libram argenti, quam quotidie in Stipendio accipiebat, Regi pro uno equo perdonaret? ----- Tandem Edgarus in Angliam rediens, diverso fortunæ ludicro rotatus, nunc remotus & tacitus canos suos in agro consumit. Et p. 93. Edgarus Athelingius nunc penè decrepitum diem ignobilis ruri degit. *This was in King* Stephen's *Reign.*

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countenance this Opinion; but they will more properly be taken Notice of hereafter.

HITHERTO I have endeavour'd to apologize for King *Edward*'s Advancement of the Duke of *Normandy* to the Throne; taking it for granted, that the Right of Inheritance was really in his Nephew *Edgar*. But, *Secondly*, What if it ſhould appear, that *Edgar* had not ſo good a Title, as has been generally pretended; but that King *Edward* himſelf was all along the true Proprietor of the Crown he enjoy'd, and might diſpoſe of it as he pleaſed? I hope it will then be allowed, that no Wrong was done to *Edgar*, by calling the Duke of *Normandy* to the Succeſſion. I deſire therefore it may be conſidered, that the Claim of *Edgar* could only be founded on his Deſcent from *Edmund Ironſide* his Grandfather; but *Edmund* being reduced to Extremities, does, *(f)* by the Advice and Approbation of his People, conſent to a *Partition Treaty*, whereby the whole Kingdom was divided between him and *Cnute*; and upon *Edmund*'s Death, *(g)* all the Nobility and Biſhops of the Realm declare upon Oath, That, by Vertue of the foreſaid Treaty, King *Cnute* was rightfully entitled to the Poſſeſſion of the whole Kingdom of *England*; and they *(h)* took their Oaths to him accordingly, as to their Lawful Prince, without any Regard to the Sons of *Edmund*, whom they denied to be their Kings. I know very well, that ſeveral of our Hiſtorians are very angry with their Countrymen upon this Account; and tell us poſitively, they were perjur'd, by a falſe Atteſtation concerning the Terms of this Treaty: But how came they to know that? And what Authority do they produce for this Accuſation?

(*f*) Chron. Saxon. ad A. D. 1016. Tum conſilium dabant Edricus Dux & Proceres, qui ibi aderant, ut Reges inter ſe pacem firmarent. Reges idcirco convenerunt apud *Olenige*, & inter ſe amicitiam ibi confirmârunt, &c. Hen. Huntingdon. L. 6. Conveniente igitur populo, & præ gaudio lachrymante, *Edmundus* ſuſcepit regnum *Weſt-Sexe*, *Cnut* vero regnum Merciæ, &c. Suſceptum eſt hoc dictum ab utroque exercitu, & magno aſſenſu firmatum. Will. Malmſbur. l. 2. c. 10.

(*g*) Poſt mortem *Edmundi*, Rex *Canutus* à Proceribus & Epiſcopis ſuis quæſivit, ſi in ullo fœdere Sociali inter ipſum & *Edmundum* Regem nuper inito, aliqua mentio de Succeſſione fratrum aut filiorum *Edmundi*, poſt mortem ejuſdem, facta fuiſſet; qui reſponderunt quòd non, &c. Brompton. Chron. & Ran. Higden.

(*h*) At illi (ſc. omnes Epiſcopi, & Duces, nec non & Principes, cunctique Optimates Gentis Angliæ, Londoniæ congregati) juraverunt Canuto Regi, quòd eum Regem ſibi eligere vellent, eique libentèr obedire; & ſuo Exercitui vectigalia dare, & accepto pignore de manu ſuâ nudâ cum juramentis à Principibus *Danorum* fratres & filios *Edmundi* omninò deſpexerunt, eoſque Reges eſſe negaverunt. Sim. Dunelm. ad A. C. 1016. Flor. Wigorn.

Truly

Truly none at all: But they expect their bare Word ſhould be taken; and we are to believe all the Great Men of the Kingdom were Perſons of neither Conſcience nor Honour; becauſe it is the Will and Pleaſure of theſe Authors it ſhould be ſo. I ſhall beg Leave therefore to look upon that Publick and National Teſtimony, relating to the Agreement between King *Edmund* and *Cnute*, to be a good Proof of the Right and Title of the latter, till ſome Evidence appears to the contrary; and from the whole Matter I inferr, That King *Edmund* having made an abſolute *Surrender and Dedition* of his Kingdom, after his Deceaſe, to King *Cnute*; his Sons, and their Iſſue were thereby entirely deprived of their Right of Succeſſion; and conſequently *Edgar Atheling* had no juſt Pretenſions to the Crown of *England*. But it will be demanded, How could the *Confeſſor* derive a Title from King *Cnute*? I anſwer; The *Confeſſor* being Half-Brother to King *Hardecnute*, (the Son of *Cnute*) and much in his Favour, was (*i*) appointed by him his *Heir and Succeſſor*; by which Donation having acquired the Crown, he had it entirely in his Power to diſpoſe of it as he pleas'd; and was under no Legal Obligation to give it to his Nephew *Edgar*, rather than to the Duke of *Normandy*. Having thus vindicated the *Confeſſor*'s Grant of his Kingdom to the ſaid Duke; I ſhall now proceed farther in my Undertaking to clear his Title.

It may poſſibly be objected againſt it, that King *Edward*, when he lay a dying, named *Harold* for his Succeſſor; whereby his former Grant to the Duke of *Normandy* was revoked, according to the Law of *England* (*k*) before mentioned, which held all *Donations* for Good and Valid, which were made at the Hour of Death; and we are told, That *Harold* challenged the Crown by Vertue of ſuch a pretended Nomination. But the Authority of *William of Malmsbury* (who lived near thoſe Times) is ſufficient to render it ſuſpected: (*l*) He

(*i*) Encomium Emmæ. p. 177. *Hardecnuto* fraterno correptus amore, nuncios mittit ad *Edwardum*, rogans ut veniens ſecum obtineret regnum; qui fratri adveniens *Anglicas* partes advehitur ---- hic fides habetur Regni Sociis, &c. Guil. Gemmeticenſis Hiſt. Norm. l. 7. *Hardecnutus* paululum confirmatus in culmine regni, fratrem ſuum *Edwardum* à *Normanniâ* revocavit, ac ſecum cohabitare fecit. Ipſe autem non plenis duobus annis exiſtens, exivit hominem, & *Edwardum totius Regni reliquit hæredem.*

(*k*) P. 23.

(*l*) Will. Malmsbur. de Geſt. Reg. Ang. l. 2. cap. ult. Poſt mortem Edwardi, Haroldus arripuit Diadema Angliæ, quamvis Angli dicant à Rege conceſſum: quod tamen magis benevolentiâ quàm judicio allegari exiſtimo, ut illi hæreditatem transfunderet ſuam, cujus ſemper ſuſpectam habuerat poteſtatem.

confeſſes

confesses indeed, that *it was reported by the* English, *that King* Edward *did appoint* Harold *his Successor*; but he tells us likewise, That he *did not think it probable, that* Edward *should transferr the Right of Inheritance on a Person, whose Power he always apprehended, and was jealous of.* This shews, that there was no good Evidence in those Days, of the Fact in Question; for if there had, it would have been impossible for *Malmsbury* to be ignorant of it. If any thing of that Nature had really happen'd; it ought to have been well attested, and publickly proclaim'd throughout the Kingdom, that there might have been no Room for a Doubt concerning it. The *Donation* to the Duke of *Normandy* was made with Solemnity; it was notified to him by no less a Person, than the Archbishop of *Canterbury*; it was ratified by the Consent and Approbation of the Nobility, and People of *England*; and lastly, his Right of Succession was sworn to by *Harold*, and others the most eminent Persons of the Kingdom; so that we have not one Historian, who flourish'd in or near those Times, but takes Notice of it; neither was there a Man in *England*, who could plead Ignorance of so publick a Transaction. What Reason, can we imagine, there should be, for *Edward* to revoke his first *Donation*, and appoint *Harold* his Successor, instead of the Duke of *Normandy?* Was *Harold* more nearly related to him? The Contrary is well known. Had the Duke of *Normandy* ever offended *Edward?* Nothing of this Nature appears in History. Was it more for the Interest, and Peace of the Kingdom? That would be a strange Assertion, if we consider *Harold*'s Oath to the Duke of *Normandy*, by Vertue of which that Duke had a just Cause of War against him, if he should presume to take Possession of the Throne. In a word, the stronger the Motives were to alter the Succession, the more reasonable it was to establish such an Alteration by the best Authorities, and in the publickest Manner; whereas on the contrary, we have all imaginable Assurance of the Settlement made on the *Conqueror*; but very slender Proofs of *Harold*'s Title.

To conclude; If after all I have hitherto urged in relation to *Edgar Atheling*, his Claim should be still thought good, and uncontestable; I beg Leave to observe farther, that after the Death of the *Confessor*, he either for-

bore to challenge the Crown as his Right; or else made an absolute Surrender of it. When *Harold* took Possession of the Throne, we meet not with the least Intimation in our Chronicles, that he thought himself injur'd; nor was there an *English* Man, that we hear of, that resented his Exclusion. Can we then imagine, that his Title was at that time look'd upon as unquestionable? Or must we believe the whole Nation unanimously concurr'd in depriving him of his Right? If they did, then the Injury was done him by his own People, not by the *Conqueror*; for he only dispossess'd *Harold*, who had no Right; and it could not be expected from him, he should place a Person in the Throne, whom they had before rejected. It is true indeed, after the Battle of *Hastings*, when the *Saxon* Nobility were sensible, that their Liberties and Fortunes were in imminent Danger, and some bold and daring Attempt was necessary; they (*m*) declared *Edgar* their King; and placed him at their Head, in order to make a Stand against the *Conqueror*; but this was a desperate and vain Effort, as the Event soon shew'd; and then (*n*) *Edgar*, with his Adherents, submit themselves to King *William*, and swear Fealty to him. In a little time after, it must be confess'd, *Edgar* (*o*) revolted, and joining with the *Scots*, laid Siege to *York*; but the *Conqueror's* Appearance obliged him immediately to retire; and then he found it necessary, by a fresh (*p*) Submission, to sue to him again for Favour; which he very generously granted him, and gave him many noble Testimonies (*q*) of it. From that Moment we hear no more of him, during the *Conqueror*'s Reign; but that he was well contented with the Honours and Riches heap'd upon him, and never would be persuaded to struggle more for a Crown; which, in the Opinion of all wise Men, it was no more for his Interest, than it was in

(*m*) Guil. Pictav. p. 204. Et Guil. Gemmet. p. 290.

(*n*) Order. Vitalis, p. 503. *Edgarus Adelinus* resistere diffidens humiliter Gulielmo se regnumque contulit.

(*o p q*) Guil. Malmsburiensis. *Edgarus Athelingius* cum Stigando & Aldredo Archiepiscopis Regis dedititius, sequenti anno, facto ad Scotum transfugio, *jusjurandum maculavit.* -------- Rediit verò brevi *Edgarus* & impetravit veniam, & *magno Donativo* donatus est, & plurimis annis in Curiâ mansit. Guil. Pictav. p. 208. *Adelinum*, quem post *Haroldi* ruinam Angli Regem statuere conati fuerant, *amplis terris ditavit*, atque in charissimis habuit eum, quia Regis *Edwardi* genus contigerat. Order. Vitalis, p. 503. Rex verò *Gulielmus*, quia idem Puer (*Edgarus* scil.) mitis & sincerus erat, & Consobrinus *Edwardi* Magni Regis, amicabiliter eum amplexatus est, & omni vitâ suâ inter filios suos honorabiliter veneratus est.

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his Power to obtain. It is evident, therefore, from good Authorities, that *Edgar* made a full and absolute Resignation of his Claim to the *Conqueror*, by Vertue of which (had King *Edward*'s Settlement been of no Authority) he now became a King *de Jure*, and had a Right to the Obedience of the People of *England*; and therefore, with the Doctor's Pardon, I shall reckon him among those Kings, who had a good Title, independent on their Possession.

I SHALL now try, if I can do as much Service to his Son *William Rufus*; and that can be no difficult Undertaking, if the Kings of *England* had a Power of naming their Successors; which, by the Authorities I have produced, seems very reasonable to believe. That the *Conqueror* declared *Rufus* his Successor to the Crown of *England*, can never be controverted by those, who are acquainted with our Histories; which agree in nothing more, than in this Particular Fact. It is true, *Robert* Duke of *Normandy*, being eldest Son to King *William*, pretended *England* belong'd to him by Right of Inheritance; and therefore, with the Assistance of some of the great *Norman* Lords settled here, gave *Rufus* some Disturbance for two or three Years. But it seems, the *English* (who had the Confidence, in those Days, (*r*) to value themselves upon their *Fidelity* to their Princes) (*s*) thought *Rufus*'s the better Title; and therefore firmly adhered to him; and defended him so well, that *Robert* found it advisable to come to an Agreement with his Brother, (*t*) by which the Kingdom was entirely yielded up to *Rufus*. We are told indeed, that (*u*) *Rufus* violating the Articles of this Treaty, the two Brothers were soon after engaged in a fresh War; but those Differences were in a very little time amicably composed, by the (*x*) Mediation of *Philip* King of *France*; of which the (*y*) *French* Historians have given an ample Account; and we do not find, that Duke *Robert* gave

(*r*) Ord. Vitalis, p. 666. *The* English *speak to* Rufus: Solertèr Anglorum rimare historias, inveniesque semper fidos Principibus suis Angligenas.

(*s*) Ord. Vitalis, p. 666, 667.

(*t*) A. D. 1091. Ord. Vitalis, p. 693. Flor. Wigorn. ad A. D. 1091.

(*u*) Flor. Wigorn. ibid.

(*x*) Guil. Gemmet. p. 293.

(*y*) Præfat. D. Gale ad Hist. Brit. Scriptores. Cur Guilielmo primo Gul. Rufus in Regno successerit, posthabito seniore fratre Roberto, aut nullam aut futilem rationem adferunt nostri homines. Habuit certè ea res nobilem controversiam, cujus Gallorum Rex arbiter, delectus, solenne pro tribunali Decretum protulit, & Fratres ad Concordiam reduxit.

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his Brother any farther Trouble, during his Reign. On the contrary, (z) about five or ſix Years before *Rufus*'s Death, *Robert* mortgages his *Duchy* of *Normandy* to him for 10000 Marks, and leaves him in Poſſeſſion of it, during his Expedition to the *Holy Land*; and it is well known, King *Rufus* held it as long as he did the Kingdom of *England*: So that if the *Conqueror*'s Authority to diſpoſe of his Crown ſhould be diſputed; his Son *Rufus* was however a Rightful King, for the greater Part of his Reign, by the Conſent and Agreement of his Brother. As for *Edgar Atheling*, it is evident, upon the ſtricteſt Enquiry, that he never laid Claim to the Crown after the *Conqueror*'s Deceaſe; neither had he any Friends to prompt him to it. The *Engliſh*, I have obſerv'd, were unanimous for *Rufus*, on whom alone *Edgar* had Reaſon to depend; and if we ſearch the Records of thoſe Times, we ſhall meet with manifeſt Signs and Indications of his entire Submiſſion to *Rufus*, as to his own particular Concerns. (a) In the laſt Year of the *Conqueror*, it appears, that *Edgar* obtain'd that Prince's Conſent to go into *Apulia* with Two Hundred Men; and we are aſſured he ſet Sail from *England* upon that Expedition. In the Year 1089, we find him in *Normandy*; and then it is (b) ſaid, he was one of Duke *Robert*'s chief Counſellors. Now it muſt be obſerved, that Duke *Robert* did at that time challenge the Crown of *England* himſelf; and therefore we may be confident, *Edgar*, who entirely depended upon him, and thought himſelf happy in that Prince's Friendſhip, would not diſoblige him by ſetting up an oppoſite Claim of his own. 'Tis rather probable, that *Edgar* would have been glad to have ſeen *Robert* on the Throne, (c) for whom he had a moſt paſſionate Concern and Affection: But however that might have been; we are ſure, that afterwards, upon the Reconciliation of the two Brothers, *Edgar* alſo made his Peace with *Rufus*; which, we may be poſitive, could not be effected, without the Recognition of his Title, and a Tender of his Service and Obedience: For a Proof of

(z) Flor. Wigorn. ad A. D. 1069. Guil. Gemmet. p. 296. Ord. Vitalis, p. 723. Eadmer. Hiſt. Nov. l. 2. p. 35.

(a) Flor. Wigorn. ad A. D. 1086. Et Sim. Dunelm. p. 213.

(b) Ord. Vitalis, p. 681. l. 8. Edgar Adelinus unus ex præcipuis Ducis Normanniæ Conſiliariis.

(c) Ord. Vitalis, l. 10. p. 778. Ducem Robertum ſibi coævum quaſi Collactaneum fratrem diligebat.

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which, he undertakes to mediate (*d*) a Treaty between *Scotland* and *Rufus*, which terminated in a happy Peace between them. A few Years after, we are inform'd, that (*e*) *Rufus* took Care to shew, in what a Degree of Favour and Credit *Edgar* was with him, by placing him at the Head of an Army, that he might settle his Nephew on the Throne of *Scotland*. Now these mutual Kindnesses, that pass'd between *Edgar* and the Two Brothers, are evident Tokens, that he had abandon'd all Thoughts of a Crown, and desired only to enjoy their Friendship, in the humble Condition of a Subject.

THE Successor to *Rufus* was his Brother *Henry*, whose Title must be the next Subject of Examination. And what is there, that can fairly be objected against it, if the *Conqueror*'s *Testamentary Power* is admitted? Was not *Robert*, the eldest Son, legally excluded by it? And did not that *Exclusion* justify *Henry*'s Claim after *Rufus*? Or must we suppose the *Conqueror* (who (*f*) had been highly provoked by *Robert*'s frequent Rebellions, by which his Life was often endanger'd; and who, besides, (*g*) plainly discern'd in his Son an utter Incapacity for Government) intended only a short Suspension of his *Title*, which was to revive again upon *Rufus*'s Decease? Upon the Death of this Prince, *Henry* loses no Time; but, with the (*h*) Approbation of the Nobility, immediately steps into the Throne, and was universally obey'd by all the (*i*) *English*, as their Lawful King. But when *Robert* return'd from the *Holy Land*, which happen'd very soon after, he presently renew'd his Claim; and was assisted in his Attempts to recover it, by several *Norman* Lords then residing in *England*. Now the Question is, Which Party was in the Right; the *English* who adhered to King *Henry*, or the *Normans* who endeavoured to depose

(*d*) A. D. 1091. Vide Flor. Wigorn. & Ord. Vital. p. 701.

(*e*) Sim. Dunelm. ad A. D. 1097. Buchanan. Rer. Scot. l. 7. fol. 75. & Flor. Wigorn.

(*f*) Will. Malmsb. de Wilhel. primo, l. 3. p. 59. & p. 62. Robertus Philippum Regem Francorum contra Patrem excitavit; quare & Genitoris benedictione & hæreditate frustratus, Angliâ post mortem ejus caruit, Comitatu Normanniæ vix retento. Et p. 86. l. 4. de Henrico primo.

(*g*) W. Malmsb. in fine Lib. 4. de Rege Hen. primo: Robertus pro mollitie animi nunquam regendæ Reipublicæ idoneus judicatus. Et vide W. Gemmet. p. 298. Ord. Vital. p. 572, 573, 659, 815.

(*h*) Chron. Saxon. ad A. D. 1100. Optimates qui propè fuerunt, ejus fratrem Heanrigum in Regem elegerunt.

(*i*) Rog. Hoveden. in Hen. primo: Episcopi, milites gregarii, & *Angli animo constanti cum Henrico perstitere.* Et Ord. Vitalis, l. 10. p. 786.

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him? If the former; then *Henry* was a King *de Jure* in their Opinion: If the latter; then it was Lawful to take up Arms against a *King in Possession*, for the Right Heir out of *Possession*; which is manifestly against the Doctor's whole Design and Purpose. Possibly it will be said, the *English* obey'd King *Henry*, because he was in *Possession*; and could not be justified upon any other Principle. But how do we know this? Is there any Evidence yet produced; or does any thing appear in our Histories, sufficient to support such an Assertion? This is the Point in Dispute, which must be proved, before the Doctor can reasonably expect his Adversaries should be convinced; and how he will be able to do that, becomes him to consider. Lastly, when the Doctor has done his worst, he can only prove King *Henry* to have been an *Usurper* the first Year of his Reign; for in the second, Duke *Robert* came to a Composition with his Brother, by which he absolutely yielded up the Crown of *England* to him. (*k*) *Ordericus Vitalis* assures us, that when both Armies were in Sight of one another, and every Moment an Engagement expected, *Henry* sends to his Brother *Robert*, to demand the Reason of his invading him. *Robert* answers, That he *had enter'd his Father's Kingdom as due to him by Birthright*. *Henry* then proposes a Conference, which was agreed to, and held before both Armies; the Issue of which was, *That both the Brothers very affectionately embraced and kissed each other, and immediately became Friends*; *Robert* renouncing all Pretensions to *England* for the future; and *Henry* obliging himself to pay him 3000 *l. per Annum*, and restore to him some Lands in *Normandy*. Thus was *Henry* confirm'd in his Throne, and reign'd very prosperously the Remainder of his Days, without any Rebellion or Disturbance. A few Years after, it is true, *Robert*, by (*l*) breaking the Treaty he had made with his Brother, and his Oppressive and Tyrannical Government, provoked *Henry* to invade *Normandy*; and the Event was, that *Robert* was taken Prisoner, and sent into *England*; where he (*m*) remained under Confinement in

(*k*) Ord. Vitalis, l. 10. p. 788. ad A. D. 1101. & Chron. Saxon.

(*l*) Ord. Vitalis, p. 814, 815.

(*m*) Ord. Vitalis, p. 823, 866. *The* Saxon *Chronicle represents this Matter otherwise; for there we find, that D.* Robert *being taken Prisoner in the Year* 1106, *continued for* 20 *Years in the Custody of* Roger *Bishop of* Salisbury, *and then, by the Advice of the Empress* Maud, *and* David *King of* Scots, *was committed to the Care of* Robert *Earl of* Gloucester, *in*

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the Castle of *Bristol* to the Time of his Death, which was the Space of Twenty Seven Years.

UPON this Occasion I hope I shall be pardon'd, if I step a little out of my way, to wipe off an Aspersion cast upon this Prince in our common Histories, upon the account of the Usage of his Brother; as if it were beyond Example barbarous and inexcusable.

I HAVE said, that King *Henry* found it necessary to invade *Normandy*, upon the repeated Complaints and Importunities of the Inhabitants of that Duchy, who represented their Miseries as insupportable under his Brother's Government. For when the *(n) Pope* desired King *Henry* to release Duke *Robert* out of Prison, and restore *Normandy* to him as his Right; the King answers, That what he had done, was at the pressing Instances of the Bishops, the Clergy, and the chief Nobility of *Normandy*; the insufferable Oppressions of his Brother tending to the manifest Ruin of their Country; and therefore they intreated him to rescue it from the Tyranny of a Person, who was by no means fit to govern. This was the true Motive of that Expedition against *Robert*; and this was the Reason, why he would not trust him again with the Government of *Normandy*; but sent him into *England*, there to be kept under a *Gentle Confinement*. I call it a *Gentle Confinement*; because I think I have good Warrant so to do; notwithstanding many celebrated Writers, and some of them of good Antiquity, have related a tragical Story of the Hardships he endured in his Imprisonment, and that at last he was deprived of his Eyesight by the barbarous Commands of his Brother. The first Author I have met with, who thought this Story worthy of Credit, is *Matthew Paris*, who gives a particular *(o)* Relation of it. But against his Authority it

Bristol *Castle*. Chron. Saxon. ad A. D. 1126. *This is also confirm'd by* Matthew Paris's Chronicon, (*a MS. written with his own Hand, now in the* Cotton *Library*. Claudius, D. 6.) *in which are the following Words:* Rex autem victor in Angliam rediens, fratrem suum Robertum misit ad Castrum de Devises deputatum Custodiæ XII. virorum fortium, perpetuo carceri mancipandum. *The Castle of the* Devises *belong'd to the said* Roger *Bishop of* Sarum.

(*n*) Ord. Vitalis, l. 12. p. 865, 866.

(*o*) Matth. Paris, (p. 63. ad A. D. 1107.) Rex *Archiepiscopum* secutus in *Angliam*, *Robertum* fratrem suum, & *Wilielmum Moretonii Consulem* perpetuo carceri mancipavit. Eodem tempore Dux *Robertus* immemor illius boni consilii, *(humiliamini sub potenti manu)* in ampullosa verba & minas prorupit, falsis pollicitis, & præcipuè *Comitis Cestrensis* animatus; deceptis igitur custodibus conatus est evadere: sed fugiens ab eisdem captus est, incidens suo manno in bitumen profundum; fuerat autem reverenter in liberâ custodiâ detentus. Quod cum Regi nunciaretur, jussit eum arctiori carceri & custodiæ mancipatum, *fulgenti obstaculo oculorum luce privari.*

may

may justly be objected, *First*, That he wrote his History above a Hundred Years after the Fact in Question. *Secondly*, This Piece of History is not found in *Roger Wendover*, (as (*p*) Dr. *Watts* has observ'd) which is sufficient to render it suspected; for those who are proper Judges in these Affairs, tell us, (*q*) that *Matthew Paris* is but the *Continuator* of *Roger Wendover*, and intended only to carry on the Series of History, where the other left off. It is true, in that Edition of *Wendover*, which *Paris* has given us, we meet here and there with some Insertions, not warranted by the genuine Copy of *Wendover* in the *Cotton Library*, yet supposed to be added by *Matthew Paris* himself; but it has been observed by learned Men, that (*r*) those Interpolations are generally Pieces of secret History, and unworthy of any Credit.

Matthew of Westminster is the next Writer, that has occurr'd to me, in whom this Story is to be found; and he seems to relate it more fully, than *Matthew Paris*. His Account is this; (*p*. 27.) That *Duke* Robert *having attempted to make his Escape out of Prison, had his Eyes put out in such a Manner, that the Balls of them were still preserv'd entire; and thus he ended his Days very miserably.* But *Henry Knighton* (who wrote at the latter End of *Richard* II.'s Reign) has thought fit to add these farther Circumstances; That *Duke* Robert *being condemn'd to die by the Barons of* England, *his Brother did him the Favour to cause his Eyes to be put out, by some* (*s*) *burning Instrument*

(*p*) *Dr.* Watts, in Variant. Lect. ad Matth. Paris. p. 63.

(*q*) Selden's Mare Clausum. Ed. Eng. Fol. l. 2. c. 15. p. 296. *The Chronicles set forth by* Matthew Paris *were wholly taken out of* Roger of Wendover, *until the 19th Year of* Henry III.

(*r*) *It may not be amiss to give the Reader a Specimen of some of these Interpolations, that he may be the better enabled to judge of the rest.* P. 58. M. Paris *tells us*, That *Maud, who was married to* Henry I. had been educated in a Monastery, where she had vowed Virginity, and was reported to have taken upon her the Veil; for which Reason she was married against her Will; and therefore she solemnly cursed her Issue, if ever she should have any, and commended them to the Devil. *Now this Passage is wanting in* Wendover; *and we know it to be false from the Authority of* Eadmerus, *who confutes it at large.*

P. 73. *The Story of* Robert *Duke of* Normandy's *Death is not to be found in* Wendover, *and well deserves to be looked on as fabulous.*

P. 243. *We have an incredible Story of King* John's *sending a private Message to the King of* Morocco, to offer him his Kingdom, and assure him he would renounce the *Christian* Faith, and embrace the *Mahometan* Religion. *A Piece of History to be found in no Author but* M. Paris; Wendover *knew nothing of it, neither is it mentioned by* Matt. *of* Westminster, *(the Transcriber of* M. Paris) *nor even by* M. Paris *himself in his* Historia minor; *for which Reasons, as well as others, Dr.* Watts *thought he had reason to reject it.* Vide D. Watts Adversaria ad Matth. Paris, ad p. 243.

These Instances may serve to shew, what Liberty M. Paris *took in his Insertions, and how little they are to be trusted.*

(*s*) Excæcari cum *batillo ardenti.*

applied

applied to them. [H. Knighton, de Event. Angliæ, l. 2. c. 8.] Now so remarkable a Punishment inflicted on so eminent a Person, as *Robert* Duke of *Normandy*, the King's elder Brother, could not surely be a Secret to all the Writers, who flourished at that Time; and had it been known to them, undoubtedly they would not have failed to give us some Account of it. But to our great Surprize, instead of allowing any Countenance to this Story, they relate the quite contrary. (*t*) *Will. Gemmeticensis* says, Robert *was a Prisoner at large* to the End of his Life. (*u*) *Ordericus Vitalis* affirms, That *he was supplied abundantly, during the Twenty Seven Years of his Imprisonment, with all manner of Delicacies. William of Malmsbury*'s Account is still more circumstantial; for he (*x*) assures us, That *Duke* Robert *being taken by King* Henry, *was kept by him as a Prisoner at large to the Day of his Death; and this*, he says, *was a laudable Instance of* Henry's *Brotherly Affection; in that he inflicted no other Punishment on Duke* Robert, *besides Solitude; if that may be call'd a solitary State, in which he was always attended with Company; and besides, was frequently entertained with Feasts, and other Diversions.* I am persuaded, these Passages are very clear and plain; and upon their Authority I shall presume to say, that those Tragical Relations of Duke *Robert*'s being deprived of his Sight, by King *Henry*'s Order, are by no means to be credited.

I NOW flatter myself, I have said all that is necessary, in Vindication of *Henry* I.'s Title; for I know not how to imagine, that *Edgar Atheling* should be any more objected. He had before yielded up the quiet Possession of the Crown to Three Kings; and therefore it is not likely, he should have any Stomach to it in this Reign. The Truth is, he had for some time liv'd with so much Privacy and Obscurity, that we (*y*) hardly meet with his Name in the Histories of *Henry* I.'s Govern-

(*t*) P. 298.

(*u*) Ordericus Vitalis, l. 11. p. 823: Rex Henricus 27 annis fratrem Robertum in carcere servavit, *& omnibus deliciis abundanter pavit.*

(*x*) Will. Malmsbur. de Gest. Angl: l. 4. de Hen. primo, in fine. Robertus D. Normanniæ à fratre Henrico captus, ad diem mortis in liberâ tentus custodiâ; laudabili fratris pietate, quod nihil præter solitudinem passus sit mali, si solitudo dici possit, ubi & Custodum diligentia, & jocorum præterea, & obsoniorum non deerat frequentia.

(*y*) *The* Saxon *Chronicle* (ad A. D. 1106.) *says*, Edgar *was taken Prisoner with Duke* Robert *at the Battle of* Tenerchebrai. Et Annal. Waverl. ad A. D. 1106. *And this, I believe, is the only Account we meet of him in* Henry *the First's Reign.*

ment; and had not *Malmsbury* told us, he was in Being when he wrote; we might well have believ'd, he had long before resign'd his Breath, as well as his Title.

KING *Stephen*'s Reign follows in Order; in which surely, if any where, we may expect to find some plain and legible Characters of the Existence and Operation of the Doctor's Principle: For *Stephen* was indeed a King *de Facto*, without any Title, but what he derived from Possession. The Kings, that were before him, had either the *Will* of their Predecessors, or the Cession of the *Right Heirs*, to render their Reigns Lawful; but *Stephen* was an *errant Usurper*. He (*z*) had sworn to the Succession of *Maud* the Empress; and he knew that (*a*) all the Nobility and Prelates had done the same; and therefore as he had obtained the Crown by *Perjury*, he could not otherwise keep it, than by Arms and Violence. It is (*b*) reported indeed, that King *Henry*, when he lay a dying, disinherited his Daughter *Maud*, and declared *Stephen* his Successor; and by this Artifice, it is said, the *Archbishop* was prevail'd with to crown him; but the (*c*) Doctor has thought fit to reject this Story, as incredible; and (*d*) I am very willing to agree with him in that Point; provided it may be allowed to be a farther Confirmation of the ancient Custom of the *Kings of* England, to name their Successors; for otherwise that Report must have been useless and insignificant; and could not possibly have served the Purpose, for which it was intended. Thus far therefore I have the good Fortune to be of the Doctor's Opinion; but that Happiness is not like to continue long; for I must now take the Liberty to tell him, that King *Stephen*'s being an *Usurper*, will be of no manner of Advantage to his Cause, that I can by any means perceive. He was advanced to the

(*z*) W. Malmsbur. Hist. Novell. l. 1. p. 100.

(*a*) W. Malmsbur. ibid. Roger. Hoveden, p. 481. Gervas. Dorob. J. Brompton, &c.

(*b*) Rad. de Diceto Abbrev. Chron. p. 505. Et Gesta R. Stephani, p. 929.

(*c*) *Defence*, p. 18.

(*d*) W. Malmsbur. Nov. Hist. l. 1. *says expresly, That King* Henry I. *when he lay a dying*, interrogatus à Roberto Comite Glocestriæ de Successore, Rex filiæ omnem Terram suam citra & ultra mare legitimâ & perenni successione adjudicavit. Et Hist. Nov. l. 2. *He says*, Henry *Bishop of* Winchester (*King* Stephen's *Brother*) *own'd publickly in a full Synod*, quòd Rex Henricus nonnullis ante obitum annis filiæ suæ quondam Imperatrici omne regnum Angliæ, simul & Ducatum Normanniæ, jurari ab omnibus Episcopis simulque Baronibus fecerit, si successore masculo ex illâ, quam Lotharingiâ duxerat, uxore careret.

Throne

Throne by the (*e*) Bishops; and confirm'd in it by the Pope: And some of the Writers of those Times (*f*) speak of it with Admiration, *that in an Instant all* England *became subject unto him.* But we must distinguish between those, that advanced him to the Throne, and those that only obeyed him, and swore to him, when he was in it. The first Sort are exclaim'd against by the forementioned Historians, (in the Places cited) as unrighteous and perjured Men; and they observe to us, that therefore the *Archbishop* of *Canterbury*, by the just Judgment of God, did not live a Year after; and the *Bishop* of *Salisbury*, by the same Hand of Providence, ended his Days very miserably. And the Doctor himself is so far from justifying such Actions, that he will freely give us Leave to account it a Crime, to set up a King *de Facto*; though he contends for Obedience to him, when he is already made. The Question therefore is, concerning those alone, who submitted to his Government, and acknowledg'd him for their King, after he was placed in the Throne; these, the Doctor is of Opinion, cannot be defended by any honest Principle, besides this, *That Allegiance is due to a King in Possession.* But if this was really the Case, why have not our Historians done us the Favour to let us know it? Why was so useful an Expedient, upon such Occasions, and Exigencies, conceal'd from Posterity? Or is there any Hint to be found in the Writers of those Times, that may help us to the Discovery of so valuable a Secret? Unkind and Ill-natur'd Historians! You that pretended to write for the Benefit of future Ages, how could you suffer us to be ignorant of a Doctrine, that had done you so much Service, and without which we can never be truly sensible of the Blessing of a Revolution? In a word, they have been pleas'd to publish some of the Reasons, by which the great Men endeavour'd to justify their Submission to *Stephen*; which must increase our Wonder very much, that the Doctor's Notion should find no Place among them, had it really been known and made use of. (*g*) Some affirm'd, that their Oath to *Maud* was forced upon them by King *Henry*; for which he express'd his Sorrow on his Death-Bed, and releas'd them from it. The great *Bishop* of *Salisbury* (*h*) excused himself in another Manner; for he pretended, that he swore to *Maud*'s Suc-

(*e*) *The Bishops tell K.* Stephen, *that he was* Ecclesiæ sinu exceptus, non manu militum in regnum promotus. W. Malmsbur. Hist. Nov. l. 2.

(*f*) Roger Hoveden, p. 481. Et J. Brompton, p. 1023.

(*g*) Gesta R. Stephani. p. 929.

(*h*) W. Malm. Hist. Nov. l. 1.

Succeſſion conditionally, *viz. Provided that the King did not marry her out of the Kingdom, without the Conſent of the Peers.* Others (*i*) alledged, it was unnatural, and againſt the Laws of the Realm, for a Woman to reign: And laſtly, it was (*k*) urged, that *Oaths* were not to be kept to the Hazard of Peoples Lives and Fortunes; for *Man was not made for Oaths; but Oaths were inſtituted for the Uſe of Men; and therefore no Man ought to be a Slave to his Oath; but his Oath ought to be ſubſervient to his Intereſt and Safety.*

THESE (*l*) Reaſons, ſuch as they are, may be found in the Writings of thoſe Times; particularly in the *Cauſa Regis Stephani*, an ancient Manuſcript in the *Cotton Library*, drawn up purpoſely in Defence of that Prince againſt *Maud* the Empreſs; and therefore it is not to be conceiv'd, ſo uſeful a Principle, ſo eſſential, as the Doctor thinks it to the Conſtitution, ſhould have been forgotten upon that Occaſion, had its Influence and Authority been ſo well underſtood, as he imagines: On the contrary, if we take an impartial View of this Reign, we ſhall meet with many Arguments to convince us, it was a Doctrine never thought of in thoſe Times. That I may fully ſatisfy the Reader in this Point, I ſhall deſire Leave to obſerve to him, *Firſt*, That there never was a more unquiet and tumultuous Reign, than *Stephen*'s was, upon the ſole Account of his being an *Uſurper*. And, *Secondly*, That they who adhered to him, did not believe it to be their Duty ſo to do, purely becauſe he was in Poſſeſſion. *Firſt*, I ſay there never was a more unquiet and tumultuous Reign, than this of *Ste-*

(*i*) Matth. Paris. p. 74. Omnes, tam Præſules quàm Comites, qui Filiæ Regis, & ſuis hæredibus juraverant Fidelitatem, conſenſum *Stephano* præbuerunt: *dicentes, fore nimis turpe, ſi tot Nobiles Fœminæ ſubderentur.* Et, *Cauſa Regis Stephani.* MS. in Bibl. Cotton. Galba, A. 3. 2. Muliebris ſuperbiæ eſt & temeritatis, ad id quod non eſt ſui juris vel ordinis, adſpirare, quam Naturâ, Sexûs infirmitas dehortantur regni laborioſa moderamina appetere. Legibus viros coercere onus grave eſt, quod viriles humeri vix ſufficiunt portare. Quid indecentius, quid inhoneſtius, quàm viros à muliere imbecillâ gubernari, & à ſuo Rege deſtitui?

(*k*) *Cauſa Regis Stephani* in Bibl. Cotton. ibid. Et tamen quamvis juramentum ſummoperè ſit obſervandum, non uſquequaque immobiliter eſt tenendum, ut nullâ ex causâ ſolvi debeat, cùm & Divinæ Legis inſtituta quædam, pro tempore, urgente neceſſitate, tranſgredi liceat. *Non homo propter juramentum, ſed juramentum propter hominem eſt inſtitutum. Et ideò non homo juramento, ſed juramentum homini, & ejus ſaluti ſubſervire debeat.*

(*l*) *The Biſhop of* Wincheſter *gave another Reaſon, why* Stephen *his Brother was receiv'd as King.* Quia longum videbatur Dominam expectare, quæ moras ad veniendum in Angliam nectebat, (in Normanniâ quippe reſidebat) proviſum eſt Paci Patriæ, & regnare permiſſus Frater meus. W. Malmsb. Hiſt. Nov. l. 2.

phen; which must be confessed by all, who have perused the ancient Writers of History; and whoever doubts of it, will be easily convinc'd, by the (*m*) Places cited in the Margin; where the Miseries the Kingdom endured by those Civil Wars, for near the Space of Fifteen Years, are very fully represented. In the (*n*) Second and Third Years of his Reign, the Commotions first began; and then *Robert* Earl of *Gloucester* declared for *Maud* against him; and at the same time many (*o*) Prelates, and Persons of the greatest Quality, in several Parts of the Kingdom, take up Arms for the *Empress*. In the midst of these Confusions at Home, (*p*) *Normandy* provides itself with a new Master Abroad; and *David* King of *Scotland* takes care to invade the Borders in her Quarrel. The Year (*q*) following, *Maud* the *Empress* lands in *England*, and was immediately assisted by the *Welsh*, under the Earls of *Hereford* and *Chester*; by whose Fidelity and Conduct she was soon in Condition to give Battle to *Stephen*, in (*r*) which she took him Prisoner. It is true, by a Reverse of Affairs, he recover'd his Liberty before the Year expired; and fancied himself powerful enough to reduce the Kingdom entirely to his Obedience. But that Piece of good Fortune added only Length, not any Quiet to his Reign; for his Enemies continued still in Circumstances to disturb his Government; and never laid down their Arms, till they had obliged him to agree to a Composition with *Henry* II. which did not happen, till the last Year of his Reign. Is it not then reasonable to expostulate with the Doctor, why he should imagine, this Prince's Case could be serviceable to his Design? He was to prove the Right and Authority of Kings *de Facto*, from the Acquiescence and Submission of the Subjects; but *Stephen* was never permitted to enjoy any Peace and Quietness, that deserves to be taken Notice of; because a great Part of *England* would not endure him for their King. Surely an Instance more prejudicial to his Purpose, could not easily be thought of; for if Examples have any Influence over the Actions of

(*m*) Gesta Regis Stephani, p. 961. W. Malmsb. Hist. Nov. l. 2. Hen. Huntingdon. l. 8. Et W. Newbrigensis. & Chron. Saxon. ad A. D. 1137.

(*n*) A. D. 1138. Ord. Vitalis, l. 13. p. 916, 919.

(*o*) Ord. Vitalis, ibid. p. 917.

(*p*) Ord. Vitalis, l. 13. p. 902, 922.

(*q*) A. D. 1139. Ord. Vitalis, p. 920, 921.

(*r*) A. D. 1141.

Princes, none can more effectually deterr them from usurping on one another, than a Reflexion upon the many Troubles and Difficulties *Stephen* was forced to struggle with. The two first were the only Years of his Reign, which were free from the Calamities of War; in which respect the whole Nation is (*t*) said to have submitted to him, and own'd him for their King. But what was this Submission? Even such a one, as is made to Torrents and Inundations, when they cannot be resisted: And for the same Reason, every sudden and powerful Invasion may be thought to be approved of, when it is not opposed. *Stephen*, by the Assistance of a potent Party in *England*, seizes the Crown, whilst the true Heir is in a distant Country, and her Friends were wholly unprepared to assert her Right. In these Circumstances they comply with the Usurper, and promise Fidelity to him. But did they believe this to be their Duty? Did they act herein upon the Doctor's Principle; *viz. That Possession made him their Lawful King?* No certainly; the contrary is most evident: For no sooner did the *Empress* arrive in *England*, and demand the Crown as her Right; but (*t*) they immediately repair'd to her, notwithstanding their late Engagement to *Stephen*; and served her afterwards with untainted Loyalty, till they had secured the Succession to her Son. Very true, says the Doctor; but herein they were guilty of a *Revolt*; they acted against their Oaths to *Stephen*; and ought to be look'd upon as Rebels. This is a very hard Censure; not only without Proof, but against the Faith of History; which assures us, that those that quitted the Party of *Stephen* for that of *Maud*, did it upon this Principle, That their first Oath to her remained still in Force, and could not lose its Obligation by their subsequent Oath to *Stephen*. This appear'd in none so remarka-

(*s*) R. Hoveden, p. 481.

(*t*) Tho. Wikes Chronicon, ad A.C. 1138. Proceres quoque regni, *quorum animus jurisjurandi transgressione vacillabat*, providâ deliberatione sibi conciliabat, sc. *Matilda Imperatrix*.

It may not be amiss to set down the Names of the chief Nobility, who declared for Maud *the* Empress, *and adhered to her Interest, notwithstanding their Oaths to* Stephen; *viz.* Robert *Earl of* Glocester, *the Earls of* Chester, Hereford, *and* Essex: Baldwin de Redvers *held* Exeter *and the* Isle of Wight *against him.* Hugh Bigod, *the Castle of* Norwich. Jeffery, *surnamed* Talebot, *the Castle of* Hereford; William de Mohun, *that of* Dunster; William Louvel, Castle-Cary; *and* Paganellus, Robert de Nichole, Eustachius filius Johannis, Willielmus filius Alani, *defended the Castles of* Ludlow, Wareham, Melhune, *and* Shrewsbury; *besides several others.* Vide H. Huntingdon, l. 8. Ord. Vitalis, &c.

ble,

ble, as in *Robert* Earl of *Gloucester*, Natural Son to King *Henry* I. who justified the Assistance he gave the *Empress*, chiefly upon (*u*) this Reason, that he had *been sworn to her; and therefore was bound in Conscience to* serve her against *Stephen*. Now it must be granted, this had been a poor and wretched Evasion, unworthy of Countenance from Persons, that pretended to Honour, and indeed common Sense; were the Doctor's Notion of the *English* Constitution true, and had it been generally received in those Times: For then their Duty to the *King in Possession* would have cleared all Objections, and removed every Scruple, which could possibly arise from the Consideration of their Oath to the *Empress*; and whatever Attempts had been made to place her in the Throne, would have been so many Invasions of the *Laws* of their Country. Well; but if the Nobility were bound by their Oaths to *Maud*, we must condemn them for taking one to *Stephen*; which the Doctor thinks is a (*x*) *severe Reflexion on our Ancestors*; because we must then say, *they either did not understand their Duty, or did not practise it.* But how can we help it, if our Ancestors were guilty of some Actions, which cannot be defended or justified? Were they the only *Sinners* in the Universe in that respect? Or is it a Shame for us to confess, what we can never hope to conceal? Faulty we are sure they were upon one Account or other, either in swearing to *Stephen*, or in revolting from him; and therefore, since it is not possible for us entirely to acquit them of both these Actions; the best Service we can do for them, is to shew they were sorry for the Crime they had committed, and endeavour'd to atone for it by their subsequent Loyalty: And for this we have the Testimony of the Writers of those Times, who tell us, that those who departed from their Oaths to *Stephen*, when the *Empress* landed, did it for no other Reason, but because they thought they were bound to it in Conscience. That this was the (*y*) real Motive, upon which *Robert* Earl of *Gloucester* declared War against *Stephen*, I have already observ'd; and must therefore wonder, how it came to pass, that the Doctor

(*u*) Will. Malmsb. Hist. Nov. l. 2.

(*x*) *View of the* Engl. *Const.* p. 6, 7.

(*y*) Animabant nimirum mentem ejus multorum Religiosorum responsa, quos super negotio consuluerat: nullo modo eum posse sine ignominiâ vitam præsentem transigere, vel merere beatitudinem futuræ, si paternæ necessitudinis Sacramentum irritum haberet. W. Malmsb. Hist. Nov. c. 1.

should

ſhould make this *Earl*'s Oath to *Stephen*, an Argument for the Support of his Cauſe; eſpecially, conſidering, that the Hiſtorian, who is moſt to be depended on in this Point, has aſſign'd different Reaſons for that Nobleman's Conduct, throughout this Affair. (z) He tells us, That *Robert* Earl of *Glouceſter* was with King *Henry* in *Normandy*, when that Prince died; and that he did not come into *England*, till ſome Months after *Stephen* had been crown'd. (a) He ſpeaks of it, as a Matter well known to him, *That* Robert *deliberated with himſelf for ſome while, what Courſe he ſhould ſteer in the Difficulties, which then ſurrounded him; for he ſaw plainly, that he could not yield himſelf a Subject to* Stephen, *without violating his Oath to his Siſter; and on the other hand, ſhould he refuſe to make his Submiſſion to* Stephen, *he ſhould not only be incapable of doing the Empreſs and her Son any Service, but expoſe himſelf to great Dangers and Inconveniencies. For* Stephen *being now Maſter of thoſe immenſe Treaſures, which King* Henry *had been hoarding up for many Years; and being withall very liberal, not to ſay prodigal, in his Temper; it could not be avoided, but he muſt be very formidable, by the great Quality, as well as Number of his Adherents; and therefore it would be in vain to think of oppoſing him at preſent, by open Force and Violence. It was neceſſary therefore for the Earl to diſſemble his Intentions for ſome while, and conſequently to do Homage to* Stephen; *which he perform'd under this Condition, that no Injury was offer'd to his Honour and Dignity, and the Promiſes made to him were kept inviolably.*

THUS we ſee *William of Malmsbury* abandons his *Earl* (for whom he had otherwiſe a particular Eſteem,

(z) Will. Malmsb. Hiſt. Nov. c. 1.

(a) Idem ibid. Eodem anno poſt Paſcha, Robertus Comes Glouceſtriæ venit in Angliam, cujus prudentiam maximè Stephanus verebatur. Is dum eſſet in Normanniâ, multâ cogitatione fatigârat animum, quidnam ſibi ſuper hoc negotio ſtatuendum putaret. Si enim R. Stephano ſubderetur, contra Sacramentum, quod Sorori fecerat, videbat fore: ſi refragaretur, nihil Sorori vel Nepotibus profuturum, ſibi certè immanitèr nociturum intelligebat. Habebat enim Rex immenſam vim theſaurorum, quos multis annis Avunculus aggeſſerat, &c. hanc copiam gazarum habenti auxiliatores deeſſe non poterant: præſertim cùm eſſet ipſe in dando diffuſus, & (quod minimè Principem decet) Prodigus. Currebatur ad eum ab omnium gentium Militibus, & à levis armaturæ hominibus, &c. ---- Et jam Proceres Angliæ in ejus aſſenſum pronis mentibus tranſierant. Erat quidem anxius Prudentiſſimus Comes, ut illos delicti argueret, & ad ſaniorem ſententiam præſenti colloquio revocaret. Nam viribus obviare nulla, propter præfatas cauſas, dabatur facultas; cui nimirum nec in Angliam venire liberum erat, niſi quaſi defectionis eorum particeps, mentis ſuæ arcanum ad tempus diſſimularet. Itaque Homagium Regi fecit, ſub conditione quâdam, ſcilicet quamdiu ille dignitatem ſuam integrè cuſtodiret, & ſibi pacta ſervaret, &c.

and

and Honour) to the Courtesy of his Reader, without any Apology for his Submission to *Stephen*, but what a Regard to his Interest, and the Necessity of Affairs could help him to. He says, *he was resolv'd to keep his Oath to his Sister, and do what he could for her Service, even at the Time he swore to* Stephen; that is, (*b*) he desired to be thought one of her Enemies, that he might the better act the Part of her Friend. And is it not then evident, that this Earl of *Gloucester* could not possibly act upon the Doctor's Principle? For by Vertue of that, his former Oath to *Maud* would have been absolutely void, and of no Obligation; but he declares himself of a quite contrary Opinion in this Part of his Management: He believ'd he could not be releas'd from his Oath to his Sister, even when he took one to *Stephen*; and did not pretend to justify his Fidelity to her, upon any other Consideration. It is apparent therefore, that his Example is by no means to be imitated, because not to be defended; for by the Confession of his greatest Admirer and Advocate, he was guilty of manifest Perjury: But then I hope the Doctor will not take it amiss, if I think him very excusable, for what he did afterwards, in Favour of his Sister; for surely, if he believ'd himself bound by his Oath to her, he had Reason to promote her Interest upon all proper Occasions, and to do his utmost to place her in the Throne.

(*b*) Will. Malmsb. ibid. Quasi defectionis eorum Particeps mentis suæ arcanum ad tempus dissimulabat.

Let me add farther, as an evident Proof, that the Doctor's Principle was not understood and approv'd of in those Times; that (*c*) *David* King of *Scotland*, though reduced to great Difficulties by his Adherence to the *Empress*, could never be prevail'd with to renounce his Oath to her, and take a new one to *Stephen*; insisting upon it to the last, that he was obliged to the inviolable Performance of it. Now had it been the current Doctrine of that Age, that whoever was in full Possession of the Throne, was to be obeyed; he would have been sensible of the Injustice and Folly of exposing himself to Dangers, for a Lady, whose Claim to his Service immediately ceased, from the very Moment her Adversary had made himself entire Master of *England*.

(*c*) Sim. Dunelm. contin. p. 262. Fide dignum R. David arbitratus est, vincere vel mori pro Sacramento, quod juravit Hæredibus Henrici Regis.

And now I may appeal to the impartial Reader, whether any Inferences can be justly drawn, from what I have hitherto observed, that can encourage the Doctor

to hope for Assistance from this Reign. *Great Numbers* (says he) *of the Nobility, the Clergy and People of* England *submitted to* Stephen, *and swore Fealty to him as their King*; but great Numbers likewise of the Nobility, *&c.* who had thus sworn to him, soon after took up Arms against him, as an Usurper. So that here is Fact against Fact, and Example against Example; and the Question is, which of the two is to be regarded, as most justifiable, and worthy of Imitation. If we are to believe the Doctor, Allegiance was due to *Stephen*; and therefore they only were good Subjects, who kept their Oaths to him, and the Breakers of them Rebels; but his Adversaries are of a contrary Opinion; for they think it more reasonable to affirm, that the Oaths taken to him were unlawful; and upon that account they highly approve of the Behaviour of those, who abandon'd *Stephen* for the Sake of *Maud*. This is the true State of the Controversy, as it presents itself to us from the View we have hitherto taken of *Stephen*'s Reign; and consequently we are yet to seek for the Satisfaction promised from it.

And the Mischief is, the farther we carry our Enquiry into the History of this King, the more we find our Expectations disappointed. *Stephen*, in the Sixth Year of his Reign, was taken Prisoner at the Battle of *Lincoln*; and then the Empress, being Mistress of his Person, seem'd to be so of the Kingdom too; the Bishops at least, and the whole Ecclesiastical State, were of this Opinion; for they (*d*) immediately took care to make their Peace with the *Empress*; swore Fidelity to her, and (*e*) excommunicated all that adhered to *Stephen*. So far, it must be confess'd, the Doctor may have Reason to believe his Cause prosperous; and the Truth is, the great Bishop of *Winchester* urged it as an Argument to the Clergy, why they should swear Subjection to the *Empress*; *viz.* (*f*) *because the Kingdom would be in Danger, if there was no Governor.* So that it was the Publick

(*d*) W. Malmsbur. Hist. Nov. l. 2. Invocatâ itaque primò, ut par est, in auxilium Divinitate, filiam Pacifici Regis (sc. Matildam Imp.) in Angliæ Normanniæque Dominam eligimus, & ei fidem & manutenementum promittimus. Malmsbury *says, he was present at this Council; and that not only all the Bishops were assembled in it, but also many of the Abbots and Archdeacons.*

(*e*) W. Malmsbur. ibid.

(*f*) W. Malmsbur. Hist. Nov. l. 2. Ne Regnum vacillet, si Regnante careat.

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Good, and Necessity of Affairs, that brought them to this Compliance; which is all the Doctor contends for. But I must beg Leave to observe to him, that before this Council was assembled, the (*g*) Archbishop of *Canterbury* being solicited to make his Submission to *Maud*, and own her Title, made Answer, *That he could not do it with Honour, till King* Stephen *had releas'd him from his Oath of Fealty he had taken to him; and therefore he, and many of his Prelates, with some of the Laity, took a Journey to the King, to conferr with him upon that Affair; who gave his Consent, that they should yield to the Necessity of the Times.* Thus it is evident, they did not think themselves at Liberty to turn over their Allegiance to *Maud*, till they were admitted to do it by *Stephen*; to which alone that unanimous Recognition of her Title in the Synod of *Winchester*, which presently after ensued, is to be imputed. Is it not then apparent, that the (*h*) Doctor's Principle had nothing to do in this Transaction? for that would have operated immediately, as soon as *Maud* was in *Possession*, without any Hesitation or Delay; and the Archbishop would never have given himself the Trouble of a Journey to *Stephen*, to ask that, which the *Constitution* of the Kingdom obliged him to. Besides, if the Example of the Prelates, and the Clergy of this Reign, is to prescribe to Posterity; it will not only be lawful to swear to every Prince in *Possession*, but to desert him too, whenever an Opportunity offers; for within a few Months after this solemn Promise of Fidelity to the *Empress*, made in a full Synod, the good Bishop of *Winchester*, finding his Brother's Party to be in a Condition to make Head against the *Empress*, takes an Occasion of quarrelling with her; defeats her little Army at *Winchester*; and obliges the brave Earl of *Gloucester* to surrender himself a Prisoner. The Consequence of which Victory

(*g*) Paucis post diebus *Theobaldus Cantuariæ* Archiepiscopus venit ad Imperatricem; *distulit sanè fidelitatem Dominæ facere; inconsulto Rege aliàs divertere, famæ & Personæ suæ indignum arbitratus. Itaque & Ipse & Plerique Præsules*, cum aliquantis Laicis, permissi ad Regem ire & colloqui, dignantérque impetratâ veniâ, ut in necessitatem temporis transirent, in Sententiam Legati cessêre. W. Malmsb. Hist. Nov. l. 2.

(*h*) *It may be fit here to observe, that* Maud, *when she was in Possession, never took upon her the Title of* Queen; *but either retained that of* Empress, *or else called herself* Domina Anglorum, *the Lady of the* English; *as appears from our Histories, and several of her Charters still extant. And yet the Great Council of the Kingdom own'd her Title, and swore* Fealty *to her: Which shews, the Doctor is mistaken,* (Vind. p. 106.) *when he affirms, in the Case of* Cromwell, *that by the Constitution of our Monarchy, he who had not the Royal Title, could not have the Legislative Authority.*

ry was, that the *Empress* was forced to give *Stephen* his Liberty, that her Brother might obtain his; and this was no sooner done, but the whole Body of the Clergy assemble again; by the Authority of the Legate, (*i*) revoke all their Promises and Oaths to *Maud*, and swear afresh to *Stephen*. (*k*) What must we now think of this nimble Change in the Bishops? Was this effected too by the Doctor's Principle? Certainly no: For the mutual Enlargement of King *Stephen*, and the Earl of *Gloucester*, was agreed to upon (*l*) these Terms; *That* Maud *should keep the Lands and Castles she was then in Possession of; and both she and* Stephen *might defend their Pretensions as well as they were able.* So that *England* was then (*m*) divided between them; and either we must say, they were both in *Possession*, or neither. If *Stephen* was King *de Facto* of his Part, so was *Maud* Mistress *de Facto* of Hers; and therefore those Bishops, whose Dioceses were in her Division, could never justify their taking Oaths to *Stephen*, upon the account of *Possession*. The Truth is, though these Bishops did all along favour the Cause of *Stephen*, before that of *Maud*; yet at the latter End of his Reign, they plainly made a Distinction between him, and a King *de Jure*; for being then, in a general Council, (*n*) requested by him, to consent to the Coronation of his eldest Son *Eustachius*, in order to defeat the Designs of Prince *Henry*; they peremptorily refused to gratify him in this Point; alledging for their Excuse an express Prohibition, which they had received from the Pope, who would

(*i*) W. Malmsb. Hist. Nov. l. 2.

(*k*) W. Malmsb. *says likewise, They excommunicated all that adhered to* Maud. Ibid.

(*l*) W. Malmsb. ibid. Ad ultimum eo modo res ventilata, ut æquis conditionibus & Rex & ipse absolveretur; nullo pacto alio interveniente, nisi ut quisque partes suas pro posse, sicut priùs, tutarentur. Et pag. sequ. Tum demum Robertus assensit; ità tamen, ne quicquam Castellorum vel terrarum redderetur, quod post Regis captionem in jus Imperatricis, vel quorumque fidelium ejus transierat.

(*m*) Chron. Saxon. ad A. D. 1140. Tunc fuit Anglia multum divisa: nonnulli tuebantur partes Regis, nonnulli Imperatricis; cùm enim Rex erat in Carcere, opinati sunt Comites & summi Viri, eum nunquam iri liberatum; ideóque fœdere facto cum Imperatrice, deduxerunt eam in *Oxenford*, & in ejus potestate oppidum posuerunt.

(*n*) Convocato apud Londoniam Generali Concilio, Theobaldo sc. Archiepiscopo Cant. Episcopis quoque & Proceribus Angliæ, proposuit animo filium suum Eustachium regio Diademate insignire, & de jure debito & jurato Henricum prævenire, & penitùs privare. Postulatus autem à Prædicto Archiepiscopo & cæteris Episcopis, quos ibidem congregaverat, ut Eustachium filium suum in Regem ungerent, & benedictione suâ confirmarent, repulsam vehementèr indoluit. Dominus siquidem Papa literis suis Cantuariensi prohibuerat Archiepiscopo, ne filium Regis, qui contra jusjurandum regnum usurpasse videbatur, in Regem sublimaret. Hen. Huntingdon. p. 395. Gervas. Dorobern. p. 1371.

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by no means permit, that *the Father, who had obtain'd the Crown by Perjury, should be succeeded by his Son.* From whence, I say, it is evident, they would not allow a King *de Facto* the same Rights and Privileges, which belong to a King *de Jure*; for the Son of a King *de Jure* has an undoubted Title to the Succession, which no Subjects ever presumed to dispute: But the Bishops did not think, that was *Stephen*'s Case; and therefore would not consent, that his Son should inherit the Crown after him. And now I hope the Reader will be able to judge, how dangerous it is, to make the Actions, even of the greatest Subjects, a Proof of the Constitution in any Reign. In this of *Stephen*, (*o*) we find the Bishops and Clergy pretended to the sole Authority (where the Pope did not interpose) of making and removing Kings; and they took upon them to dispose of the Allegiance of the Subject, whenever they judged it necessary; or thought they might do it with Safety. But will any one inferr from hence, that such Proceedings were warrantable by the Laws of *England?* Or that Oaths taken to a Person, that has the Power in his Hands, are to be considered only as the Effects of Fear and Compulsion; and are therefore of no Obligation? And yet this was one of the Arguments the Bishops insisted on for their Justification, in the contrary Oaths they took to *Maud* and *Stephen.* But their chief Plea on these Occasions, was the Pope's Authority, to which they profess'd an absolute Obedience. The Doctor is pleased to (*p*) affirm, *That his Adversaries had not proved, that this pretended Power of Popes, in setting up Kings, was ever practised; or that in Obedience to any such Papal Injunctions, Subjects had ever sworn Allegiance to Non-Hereditary Kings.* But he must allow me to say, they had very good Evidence for this Assertion; and it is somewhat strange, the Doctor should overlook it, in his Perusal of *William of Malmsbury:* For that Historian (*q*) tells us, that when *Stephen* had recovered the Throne, *Henry* Bishop of *Winchester*, the *Pope*'s *Legate*, held a Council of *Bishops*, in which (notwith-

(*o*) W. Malmsb. Hist. Nov. l. 2. *The Legate tells the Council:* Ventilata est hesterno die causa secretò coram majori parte Cleri Angliæ, *ad cujus jus potissimùm spectat Principem eligere, simulque ordinare.*

(*p*) *Defence*, p. 25, 31.

(*q*) W. Malmsb. Hist. Nov. l. 2. Auditum est lectas in eo literas Domini Apostolici, quibus modestè Legatum argueret, quòd liberare fratrem suum dissimulasset; delicti tamen superioris gra-

ſtanding their former repeated Oaths to *Maud*) they all declare for *Stephen*; and this they did *in Obedience to the Pope's Command, whoſe Letter was read before them.* And ſome Years after, when *Stephen* endeavour'd to get his Son crown'd, the (*r*) Biſhops abſolutely refuſed it; alledging for their Excuſe, that they *had received expreſs Orders from the Pope, never to comply with ſuch a Propoſal.* I might produce farther Teſtimonies, to ſhew the great Influence the Pope's Commands had over the Prelates, and even ſome of the Nobility too, in this Reign; but would it from thence follow, that the *Pope's Depoſing Power* was then eſtabliſh'd by Law? That it was a Part of our *Conſtitution?* And that none could be Lawful Kings, but ſuch as were advanced to the Throne by his Conſent and Approbation? If this was really the Caſe, it muſt be confeſs'd, *Maud* had a very ill Cauſe; and ſo has the Doctor too; for then, it ſeems, *Stephen* was a *Lawful* King, by the *Pope's* Authority; not by Virtue of his being in *Poſſeſſion.*

THESE Reflexions upon *Stephen*'s Reign, have ariv'd to an Extent beyond my Deſign and Expectation; but I hope it will be conſider'd, that being the firſt King from the Conqueſt, who was truly and properly King *de Facto*, it was highly requiſite, his Story ſhould be examin'd with Care and Exactneſs; for tho' the Doctor has thought fit to paſs it over with very little Notice; yet with his Leave, I ſhould imagine it very reaſonable to expect, ſome Diſcoveries might be made of the Authority of Kings *de Facto* in his Reign, if it had been own'd and allow'd by the *Conſtitution.* The Event indeed is by no means favourable to the Doctor; and I am perſuaded, the Reader will be of the ſame Opinion. I ſhall now only add the following ſhort Obſervations; and then ſhall put an End to this troubleſome Reign.

THE firſt is taken from a Paſſage in our Hiſtorians, who ſpeaking of the Agreement between King *Stephen*,

tiam facere, & magnopere cohortari, ut quocunque modo, vel Eccleſiaſtico, vel Sæculari, poſſet, ad Germani liberationem accingeretur. ----- Itaque jubere (ſc. Legatum) ſe, de parte Dei & Apoſtolici, ut Regem voluntate populi, & aſſenſu Sedis Apoſtolicæ inunctum, quantis poſſent viribus; nexè juravente turbatores verò Pacis, qui Comitiſſæ Audegavenſi faverent, ad Excommunicationem vocandos, &c.

(*r*) Dominus ſiquidem Papa literis ſuis Cantuarienſi prohibuerat Archiepiſcopo, ne filium Regis, qui contra juſjurandum regnum uſurpaſſe videbatur, in Regem ſublimaret. Hen. Huntingdon. p. 395. Gervaſ. Dorobern. p. 1371.

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and *Henry* Duke of *Normandy*, tell us expresly, That by (*s*) Virtue of that Accommodation, and not sooner, *Stephen* became a *Rightful King*; which shews, they did not believe his *Possession* had made him so before. *Secondly*, When *Henry* II. obtain'd the Crown, *he deposed the Noblemen made by* Stephen, *as meer imaginary, false Earls, and Lords; and resumed also the Lands granted to them by that King, tho' King* de Facto: *And all this was done for this sole Reason*; viz. *because* Stephen *was an Usurper; and* (*t*) *therefore his Acts ought not to be prejudicial to the Lawful King; As the Chronicle of* Normandy, *the Book of the Abbey of* Waverly, *Mr.* Selden *out of them,* Guil. Neubrigensis, *and* Chron. Brompton, *inform us.* This Remark was long ago made by Mr. (*u*) *Selden*, and Mr. (*x*) *Prynn*, Names of great Authority in our History, and who can never be suspected of Partiality in this Controversy. On the other hand, *Maud* the Empress had created (*y*) *Milo*, Earl of *Hereford*; (*z*) *Gaufred de Magna Villa*, Earl of *Essex*; and (*a*) *Robert de Sigillo*, Bishop of *London*; of which Honours we do not find, that *Stephen* pretended to deprive them; and we are sure the Bishop continued in Possession to the Time of his Death, which was not till Ten Years after.

THE next King, whose Title I am now obliged to enquire into, is *Henry* II. (*b*) whom the Doctor is pleas'd to reckon among his *Non-Hereditary*, or *de Facto* Kings, for these two Reasons: *First*, Because his Mother *Maud* the Empress, from whom he derived his Right, was living in the fourteenth Year of his Reign. *Secondly*, Because the Royal Family of *Scotland*, being descended from *Edgar Atheling*'s Sister, were before him in Blood; and therefore ought to have enjoy'd the Crown. But if it should appear, that these undoubted Heirs entirely resign'd up their Rights and Pretensions; I hope then the Doctor will allow *Henry* II. to be a Lawful King, without

(*s*) W. Neubrigensis, l. 1. c. 30. p. 105. Walt. Hemingford. c. 76. Et Johan. Brompton, Chron. p. 1037. Quibus, Deo propitio, solenniter actis, *R. Stephanus tunc quasi primò justè Angliam recepit.* Matth. Paris, p. 86. ad A. D. 1153. *Justitiâ de cœlo prospiciente*, Rex Anglorum Stephanus, & Dux Normannorum Henricus, apud Wallingford in Concordiam convenerunt.

(*t*) Chartæ Invasoris præjudicium legitimo Principi minimè facere debent. J. Brompton, Chron. p. 1046.

(*u*) *Titles of Honour*, p. 538.

(*x*) Prynn's *Register of Parl. Writs*, Part 1. p. 240.

(*y*) Rymer Fœdera, &c. Tom. 1.

(*z*) Camden's Britannia.

(*a*) Sim. Dunelm. p. 269. Gervas. Dorobern. p. 1355. Godwin de Præsul. & Wharton de Episc. Lond.

(*b*) *Defence of his View*, p. 163, 164.

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having Recourse to his Hypothesis. That the *Empress* had a just Title to the Crown, after her Father's Decease, is not to be disputed; for all imaginable Care had been taken, to secure the Succession to her, by the Oaths of all the Prelates, and Nobility: And therefore she claim'd it as her Birthright; and would never yield up the quiet Possession of it to *Stephen*. But we have likewise a well-grounded Assurance, that she never intended to sit longer in the Throne, than till her Son became capable of the Government. This was probably the Reason, why she would not take upon her the Title of *Queen*, even when her Enemies were at her Feet, and she seem'd to be entirely in Possession of the Kingdom; for upon any other account to have declined a Coronation, (*c*) considering the Disposition and Temper of those Times, might have proved very prejudicial to her Interest. During the tender Age of her Son, she was contented to endure the Fatigues of a Military Life for several Years; but at length, having lost her two great Supporters, the Earls of *Gloucester* and *Hereford*; and being tired out with (*d*) Vexations and Disappointments, she resolves to leave *England*, and to spend the rest of her Days in Peace and Quietness with her Husband in *Normandy*. So that now it was plain, the future Prosecution of the War against *Stephen*, was wholly devolved upon her Son; and it seem'd but reasonable, that the Crown of *England* should be the immediate Recompence of his Trouble in acquiring it. About (*e*) two Years after his Mother's Departure, Prince *Henry* landed in *England*, upon the *English* Nobility of his Mother's Party having declar'd, that they would not stir, till he (*f*) who had the Right, return'd into *England*: On his Arrival, tho' then but Sixteen Years of Age, many of the Nobility discover'd their Inclinations to him; (*g*) *because, of Right, all belong'd to him; and they were desirous of securing*

(*c*) *Angli nisi coronati Rege servire non erant soliti.* Ord. Vitalis, l. 3. p. 503.

(*d*) Imperatrix jam Anglicanæ discordiæ tædio affecta, in Normanniam transfretavit, malens sub tutelâ mariti sui in pace quiescere, quàm in Angliâ tot molestias sustinere. Gervas. Dorobern. p. 1363. ad A. D. 1147.

(*e*) Gervas. Dorobern. ad A.D. 1149.

(*f*) Gervas. A. 1149. p. 1366. Nolebant enim Comites Angliæ & Proceres contra Regem Stephanum liquam excitare seditionem, eò quòd Robertus & Milo Comites universæ carnis viam ingressi fuerunt, & Imperatrix transfretaverat, nisi *Ipse*, ad quem omnia de jure contingebant, in Angliam rediret.

(*g*) Quia eum omnia de jure contingebant. ---- Et jura Regni Henrico jam militi juvenculo conservare volebant. Gervas. Dorobern. p. 1366, 1367.

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the Rights of the Kingdom to that young Knight. From which Passages I may venture to inferr, that his Mother had actually then made over her Title to him; for how he should have a *Right* upon any other account, is not easy to imagine. He did at that time but shew himself to them, to fix them to his Party, and then went forward into *Scotland*, to the King his Cousin, who also treated with him, as claiming the Crown of *England* in his own Right, and engag'd him by Oath, (*h*) if he recover'd the Crown, to let him have *Newcastle* and *Northumberland*, and all the Country between the *Tine* and the *Tweed*. In the Beginning of *January* 1150. (*i*) he return'd from *Scotland* into *Normandy*; and then his Father (*k*) *Geoffrey* of *Anjou* resign'd up the Dukedom of *Normandy* to him, which Dukedom *Geoffrey* had held in Right of his Wife *Maud*; and therefore it is probable, that at her Instance, at least not without her Consent, he gave it up to her Son *Henry*: And if his Mother was content to resign to her Son her Right to the Duchy of *Normandy*, of which she and her Husband were then in quiet Possession; we have much more Reason to think, she did resign up to him her Right to the Crown of *England*, which he himself was to be at the Pains of recovering by Force. He stay'd in *Normandy* and *Aquitaine* till the Year 1153, being engag'd in a War with the *French* King; and during that time the War was renew'd and carry'd on in *England*, between King *Stephen*, (*l*) and the Lords, that stood up against him, to preserve the Rights of the Crown for the young Duke *Henry*, as the Historian tells us: So that it appears, they had then no farther Concern for his Mother; but look'd upon the Right of the Crown as devolv'd on him; to whom, next time he came over into *England*, it was agreed by King *Stephen* himself, that after his Decease, it should accordingly descend. And nothing seems to put this Matter more out of que-

(*h*) Hoveden, fol. 280. b. 50. inter Scriptor. post Bed. Henricus autem filius Matildis Imperatricis jam 16 annorum Juvenis nutritus in Curiâ *David* regis Scottorum avi matris suæ, factus est miles ab eodem Rege David in Civitate Carleoli, prius dato Sacramento, quòd si ipse Rex Angliæ fieret, redderet ei Novum Castellum, & totam Northumbriam; & permitteret illum & hæredes suos in pace sine calumniâ in perpetuum possidere totam terram, quæ est à fluvio Twede ad fluvium Tine.

(*i*) Gervas. p. 1367.

(*k*) Diceto, p. 525. Gaufridus Plantegenest reddidit Ducatum Normanniæ Henrico filio suo. Knyghton, p. 2390. Et sciendum est, quòd decimo quinto anno regni Regis Stephani, Galfridus Comes Andegaviæ reddidit Henrico filio suo totam Normanniam.

(*l*) Gervas. ibid.

 stion,

ſtion, than the (*m*) Joy which the Empreſs *Maud* expreſs'd upon her Son's Return into *Normandy*, after he had perfected this Agreement with *Stephen*; an undoubted Sign, that he had done nothing in that Act againſt her Conſent, much leſs to her Wrong and Prejudice; and yet by that Accommodation, the Succeſſion was ſettled on the Son, without any manner of Regard to the Mother's Right. And if we conſider the Temper of the Empreſs, that will ſtill add Force to this Argument: We find this to be her Character, That ſhe was a Princeſs of a very great Spirit; and her Carrying it ſo high upon her Victory over King *Stephen*, is a ſufficient Proof of it. Now ſuppoſing that ſhe was of that Temper, and that ſhe had not reſign'd up her Right to the Crown, but ſent her Son over only to act in her Name; and he ſo far abus'd his Mother, as without her Authority to give away her Right for ever, reſerving only the Reverſion of the Crown to himſelf: It cannot be conceiv'd, that we ſhould find nothing related in our Hiſtorians, either done or ſaid by the Empreſs, in Vindication of her own Right; eſpecially if we conſider, that *Henry* did not ſtay in *England* long after the Agreement was made between King *Stephen* and him; but return'd back again ſoon into *Normandy*, which of all Places one would think he ſhould not have choſen to go to, had he done his Mother, that was there, ſo great an Injury; nor would ſhe have welcom'd him thither with ſo much Joy; but rather have ſhew'd her Reſentment, by raiſing him ſome Trouble there. Yet we find nothing, but that he liv'd there quietly, without the leaſt Trouble from his Mother; and ſtay'd there till he was ſent for into *England* upon King *Stephen*'s Death; and then we have no Ground to imagine, but that his Mother gave him Joy, and wiſh'd him a good Voyage hither, and a happy Reign: At leaſt, the Silence of the Hiſtorians, conſidering her Temper, is a better Argument, that ſhe had given up her Right, than their not mentioning her Reſignation, nor producing an Inſtrument of it, is of the contrary. (*n*) Beſides, we are told, King *Henry* put off his Expedition to *Ireland* by the Perſuaſions of his Mother; which can never be believ'd by thoſe, who think ſhe reſented his Poſſeſſion of the Crown. And laſtly, we have evident Proof, that ſhe took her Son's Part in his Quarrel against

(*m*) A *Genitrice ſuâ* & Fratribus, & omni gente Normannicâ, &c. *debitâ lætitiâ & honore* receptus eſt. Hen. Huntingdon, l. 8.

(*n*) Chronicon Normanniæ, f. 991. ad A.D. 1154 anno primo Hen. ſecundi.

gainst *Thomas Becket*. In the *Cotton Library* there is an (*o*) ancient and very valuable Collection of Letters, by *Thomas Becket* and others, relating to his Case; in (*p*) one of which it appears, that King *Henry* had complained to his Mother against the Archbishop, and that she reproved *Nicolas de Monte*, the *Archbishop's* Friend, very sharply upon that Account. Surely this was no Sign of any Misunderstanding between the Son and the Mother; but rather an undeniable Testimony of the mutual Confidence there was between them, since the Injuries done to the one were resented by the other; which could never possibly have happen'd, had the *Empress* look'd upon her Son as an *Usurper*.

(*o*) Biblioth. Cotton. Claudius, B. 2. Et vide *Bishop* Stillingfleet's *Answer to Mr.* Cressy's *Epistle Apologetical to a Person of Honour*, p. 380.

(*p*) L. 1. Ep. 49.

Secondly, That the House of *Scotland* ever laid any Claim to the Crown of *England*, upon the account of their Descent from *Margaret*, the Sister of *Edgar Atheling*, no where appears; on the contrary, it is an undeniable Truth, that *David* King of *Scotland* (Nephew to *Edgar*) swore to the Empress *Maud*'s Succession; asserted her Right to it, to the manifest Hazard of his own Kingdom; and at length, by his steady Adherence to her Cause, and his Fidelity to her Son, with whom he made the Agreement just now mention'd, contributed very much to his Advancement to the Throne. Which Actions, if they were not good Evidences of his having quitted all Pretensions to the Inheritance of *England*, it was certainly impossible for him to give any that would have been good.

THUS far I have endeavour'd to clear the History of our Kings, from the Conquest; and perhaps have succeeded in my Design; which was to shew, that the Subjects had Reason to obey them, as Lawful Sovereigns, *Stephen* only excepted, without the Help of the Doctor's Principle. But if I presume too much upon the Strength of my Arguments, I have this Comfort however, that the Doctor will not be able to overthrow their Probability at least; which I cannot but think necessary for him in this present Undertaking. For were it only uncertain, whether *William* I. and his Sons, had a Legal Title to the Crown, (without regard to their Possession) this very Uncertainty would be a sufficient Confutation of what he has urged from their Reigns; because his boasted *Constitution* absolutely depends upon the undoubted

ed Existence of Kings *de Facto*, who were submitted to and obeyed, for no other Reason, but upon the account of their being in the Throne: But the Doctor cannot be sure, the Subjects did not think themselves bound in Conscience, to pay their Allegiance to these Princes upon other Considerations, besides their *Possession*; and consequently his Cause is far from being secure. He is pleas'd indeed to expect, we should demonstrate the Rights of these Princes; and therefore (*q*) complains of one of his Answerers, *That he had not proved, that the Subjects submitted to certain Kings* (whom he had called *Kings* de Facto) *upon the Score of Hereditary Right, or of any Right at all, antecedent to their Possession, which* (says he) *of all things he ought to have done.* But by his Leave, his Adversaries will never think it their Duty, to prove the Rights of Princes, more than of any private Men; which, by the establish'd Rules of Equity, ought always to be presumed, and taken for granted, till the Contrary is made evident. On the other hand, none are to be esteemed Criminals without Conviction; and yet such were certainly all Kings *de Facto*; for the Kingdoms then possess'd, did of Right belong to another, from whom they were forced by Violence, and withheld by notorious Injustice. Since the Doctor therefore has thought fit to charge so many of our Kings with this Crime; it becomes him to make it good by undoubted Testimonies and Authorities; otherwise he denies them that Justice, which the Laws of all Countries allow to the meanest Subjects, who are ever reputed Innocent, till the Guilt they are accused of, is clearly detected, and manifested.

(*q*) *See his Defence*, p. 21, &c.

THE Doctor perhaps may now expect, I should follow him through his whole List of Kings *de Facto*; but since he has not thought it worth his while, to take much Notice of them himself; he will excuse me, if I pass them over with as little Regard: (*r*) He has been pleas'd indeed to draw an Argument from a Passage in our Homilies relating to King *John*; and (as the (*s*) Bishop of *Worcester* had done before him) urges it as a Proof, That the *English* Clergy in Queen *Elizabeth*'s Reign, thought Allegiance was due to King *John*, as a Lawful Prince; *because they call him the Subject's Sovereign Lord the King; and their Natural Lord the King of* England:

(*r*) *See his View*, p. 95, &c.

(*s*) *Bishop* Stillingfleet's *Unreasonableness of a new Separation*, &c. p. 32, 33.

England; *whereas it is well known, that King* John *was no more than a King in Possession; for* Arthur, *who was his elder Brother's Son, and put up a Claim against him, with his Sister* Eleonore, *who was kept in Prison all his Reign, were nearer in Blood to the Throne, than himself.* But let the Doctor be as confident as he pleases; we have very good Authority to affirm, that King *Richard* (*t*) appointed his Brother *John* his Successor, by which *Testamentary* Right (according to ancient Custom) he might become a Lawful King, and therefore *John* pretends to have succeeded *Jure Hæreditario.* In the next place it appears, that (*u*) *Arthur* very early submitted to King *John*, and did Homage to him; and (*x*) I find an Instrument cited out of *Chopinus*, which shews, he acknowledged *John* to be King of *England*; upon which my (*y*) Author makes the following Reflexion: *Truly if* Arthur *had not thought* John *a Lawful King, he would not in time of Enmity so have term'd him; but he must needs repute him a Lawful King, when at* Vernon, *the* French *King being present, he did Homage to* John, *as to the King of* England *his Sovereign Lord.* Now as the *Bishop* of *Worcester*, and the Doctor ask, why we may not do as much for any King *de Facto*, as the People of *England* did for *John*: So I would be informed in my Turn, whether the Subjects could do less, than call him King, and obey him as such; since *Arthur*, the true Heir, had done so before them. And why might not this be the Reason, that the Convocation bestows the Title of *King* upon *John*; and speaks of him, as a Lawful Sovereign? Besides, the Doctor has been told, that were *John* no more than a King *de Facto*, it was still unlawful for the Pope to *curse* him; to *absolve the Subjects from their Allegiance to him*; and give *the Kingdom* to the *Dauphin of France*, which are the chief Points the *Homilies* intended to condemn. For their Design was, to censure the Pope's Interposition in the Affairs of *England*, and to reject his pretended Authority in disposing of the Obedience of

(*t*) *Dr.* Brady *at the End of* Richard I. *and History of the Succession*, p. 377.

(*u*) Matth. Paris, p. 200.

(*x*) *In Serjeant* Fairfax's *Confutation of Serjeant* Brown's *Errors, upon the Stat.* 25 Edw. 3. *of Children born beyond Sea, (a MS. written in Queen* Elizabeth's *Time) this Record is recited out of* Chopinus: Arthurus Dux Britanniæ, Comes Andegaviæ, &c. Noveritis quòd feci charissimo Domino meo Philippo Regi Franciæ illustri Homagium Ligeum, &c. de feodo Britanniæ, &c. quando Deo volente ipse & ego ea acquisiverimus contra Johannem Regem Angliæ.

(*y*) *Serjeant* Fairfax. ibid.

Subjects; and therefore it does not follow, becauſe they diſallow of the *Barons* transferring their Allegiance to the *Dauphin*, at the Pope's Inſtigation; that therefore they held it unlawful for them, to preferr *Arthur*'s Title to *John*'s. But then the Doctor thinks, they would not give *John* the Name of *King*; much leſs *would they honour him with the Appellation of their Natural Lord and Sovereign, had they not believ'd, that Poſſeſſion gave him a ſufficient Title; for by Deſcent it was impoſſible he ſhould have any*; Arthur *and his Siſter (his elder Brother's Children) being living.* But with all due Reſpect to the learned Biſhop and Doctor, I muſt take the Liberty to ſay, they are much miſtaken, when they affirm, that (z) *Arthur* was alive, when the *Barons* invited the *Dauphin* into *England*; that Prince having been dead fourteen Years before. So that the only poſſible Bar to King *John*'s *Title*, muſt be *Eleonore*, *Arthur*'s *Siſter*; (a) who was indeed living many Years after *Henry* III. poſſeſs'd the Throne. Upon which account (unleſs King *Richard*'s Power to diſpoſe of the Succeſſion be allowed) I ſhall not pretend to defend King *John*'s Poſſeſſion of the Kingdom, againſt a Right ſo manifeſt, as hers was; which it does not appear, ſhe had ever ſurrender'd: Tho' at the ſame time, I cannot but think it ſtrange, if there had been no manner of Objection againſt her Title, that neither the *Pope*, nor the *French* King, nor the *Barons* of *England*, in their frequent Quarrels with King *John*, and his Son, ſhould ever ſet up that Lady's Claim againſt them, and reproach them with Injuſtice to her; which yet they do not ſeem to have ever done, as far as we can learn from the Hiſtories of thoſe Times; nor indeed does it appear, that *Eleonore* ever laid Claim to the Kingdom. But I am not ſolicitous about this Matter; and therefore ſhall, without any Difficulty, agree with the Doctor, if he inſiſts upon it, that King *John* was no better, than a King *de Facto*, at the Time we are ſpeaking of; his Niece being ſtill living. But is it impoſſible, that the Authors of this Homily ſhould, through Ignorance or Inadvertency, think better of King *John*'s Title, than it deſerved? Might they not believe, that *Eleonore*, as well as her Brother, was then dead; and conſequently, that his Right was not to be diſputed? This Conſideration was ſuggeſted to the Doctor by one of his Adverſaries, but without

(z) Arthur *died* A. D. 1202. *The Barons invite the* Dauphin, A. D. 1216. Matth. Paris.

(a) *She died in Priſon*, A.D. 1241. M. Paris.

without any Success; for the (*b*) Doctor thinks it a Reflexion upon the learned Compilers of the Homilies, to imagine, *they were not as well acquainted with the History of that Age, as we.* Now, tho' I will never allow the Doctor to have more Reverence and Esteem for those Authors, than myself; yet I can easily believe, they were mistaken in this Point of History; and my Reason is, because I find them guilty of a much greater Error, in this very Passage, that is now before us. If he will be pleased to cast his Eye upon this Part of the Homilies, he will be sensible, they reproach the *Barons*, &c. with taking up Arms for the *Dauphin* against King *John*, at the Instigation of the Pope; whereas it is a Truth not to be called in Question, (if *Matthew Paris* may be credited) that the Pope discourag'd that Rebellion to the utmost; and at last excommunicated the Promoters and Fomenters of it. The Methods made use of by him to suppress those Insurrections, are so copiously related by that Historian, that it may well seem wonderful, they should slip out of the Memory of the Writers of this Homily; but they might easily be supposed ignorant of the Time, when *Eleonore* died; because she is hardly mention'd by that Author, throughout his whole Account of King *John*'s Reign; and when he takes Notice of her Death under *Henry* III, he does it in so few Words, that it might easily escape a diligent Reader's Observation. If any should be offended with the Liberty here taken with the Homily; I must again assure my Reader, it proceeds not from the least Disaffection to the Composers, much less to the Doctrine of it, which is the only thing we are obliged to maintain; not the Arguments made use of to prove it. So that it still remains true, that the *Pope* had no Authority to absolve the People of *England* from their Allegiance to King *John*; and whoever took up Arms against him, by Virtue of any such Command or Injunction, was guilty of Rebellion; tho' it is also certain, that the *Pope* never advised the War maintained by the *Barons* for the *Dauphin*; but on the contrary, censured, and condemn'd it. Lastly, the Doctor insists upon it, that to call *John* King of *England*, *and Natural Lord*, *and Sovereign*, are evident Signs, they thought him to be a *Rightful King*. But this Consequence, as to calling *John* King of *England*, is not so certain,

(*b*) *Defence*, p. 139.

certain, as the Doctor takes it to be; for the Historians, that did not believe *Stephen* had a Right to the Throne of *England*, always give him the Title of *King*; even *Maud* the Empress herself, (*c*) in her Charter to *Milo* of *Hereford*, styles him King of *England*; tho' at that Time he was her Prisoner. And it is worth observing, that the Scripture tells us, that *Ishbosheth* reigned Two Years, and *Athaliah* Six; but nobody will inferr from thence, that he was a Lawful *King*, or she a *Queen:* And which is still more remarkable, (*d*) *David* calls *Absalom* King; and yet surely he never acknowledged, he was so *de Jure*. I must desire likewise, it may be consider'd, whether the Word *Natural* is applicable to a King *de Facto*; for my (*e*) Lord Chief Justice *Coke* teaches us, That *Natural Allegiance is due originally by Nature and Birthright; and he that oweth this, is called* Subditus Natus; *and therefore in an Indictment for Treason against* J. Dethick, 2d *and* 3d *of* Philip *and* Mary, *it ran*, Contra Philip. & Mariam supremos Dominos suos; *where* Naturales *was omitted, because King* Philip *was not his Natural Liege Lord.* From whence it seems plain, that King *John*, having no Title by Birthright, could not properly be called *the Natural Lord, and Sovereign of the People of* England; and therefore the Writers of the Homilies, when they speak of him in those Terms, did believe he had a Right, by *Blood*, to the Crown; or else we must say, they did not truly consider the Propriety of that Expression.

I NOW proceed to the House of *Lancaster*; and shall examine the several Observations, which the Doctor is pleas'd to think for his Purpose, in the History of that Family. (*f*) He begins his first Remark with a Reflexion upon the Conduct of Bishop *Merks* of *Carlisle: Of all the Great Men* (says he) *we meet with in our History, none was more likely to have stood out against the Government of a King* de Facto, *than that Bishop; and yet it is certain, that he sate*

(*c*) Rymer. Tom. 1. p. 8. Matilda Imp. Hen. R. filia & Anglorum Domina. Hanc autem Donationem feci ei apud Oxineford, &c. Pro servitio suo quod mihi fecerat, & ita quod tunc habebam in captione meâ apud Bristoll. Regem Stephanum, qui Dei misericordiâ & auxilio Roberti Com. Gloceſt. fratris mei, & auxilio ipsius Milonis & aliorum Baronum meorum captus fuit, &c. Test. Theobaldo Archiepiscopo Cant. Roberto Episcopo Lond. Alexandro Episcopo Lincoln. Bernardo Episcopo Sancti Davidis, Nigello Episcopo Eliensi, Davide Rege Scot. Roberto Com. Gloue. Reginaldo Com. Cornubiæ.

(*d*) 2 Sam. xv. 19.

(*e*) *In* Calvin's *Case*.

(*f*) *View*, p. 4.

in Henry IV.'s *first Parliament, in which those Acts were past, that we have in the Statute-Book; for it was at the Close of that Parliament, he made his Speech in Behalf of King* Richard; *and some time after pleaded that King's Pardon for a Conspiracy against him, for which he stood condemned to die.* And (*g*) a little after; *It is a great Mistake to think, there were any Nonjurors in the Numerous Party, that espoused the Title of the House of* York; *for all the Partizans of that House lived in Submission, and took Oaths of Allegiance to the Three* Henry's. Would not any one now conclude from these confident Passages, that the Doctor had Demonstration on his side; and that it could never be disputed, but that this Bishop of *Carlisle* had acknowledged *Henry* IV. and sworn Allegiance to him? But what if the Doctor had really no Foundation for these bold Assertions? And there is in Truth no manner of Evidence, that ever this Bishop took an Oath, or submitted to *Henry* IV. Have we not then good Reason to complain of the Injury done to that Prelate's Memory? And will it not become the Doctor to make him Reparation? It is a hard Case, that a Person, so highly (*h*) honoured in History, and so much reverenced by the ablest and most impartial Judges, should at last be called to an account, and fall under the Doctor's Censure, for an Action universally applauded, without the least Contradiction, for more than Three Hundred Years; surely the Arguments should be very powerful, that can easily ruin so well established a Reputation; and nothing but the irresistible Force of Truth could prevail with the Doctor to rob his Country of so glorious an Example of Fidelity and Fortitude. Well; it is in vain to spend Time in Expostulations, if the Matter of Fact is really as he represents it; his Proof of which I shall now consider. Thomas Merks, *Bishop of* Carlisle (*says he*) *submitted to* Henry IV. *and acknowledged his Authority; for he sate in his first Parliament*, &c. But how does it from thence follow, that he must have submitted to *Henry* IV? The Doctor knew very well, that no Qualifying Oaths were then required of Peers at their Entrance into Parliament: And by a late Example he might have been satisfied, that his Appearance in Parliament (I might call it a *Convention*; for I shall prove it to have been no better by and by) was no Argument, that he approved of their

(*g*) *Vindic.* p. 5.

(*h*) *See* Hall's *Chronicle.* Godwin de præsulibus Ang. *Lord Chief Justice* Coke's *Inst.* p. 2. c. 15. De Art. Cleri. *Bishop* Stillingfleet's *grand Question*, p. 146.

Proceedings: For he cannot be ignorant, that ſeveral of the *Deprived Biſhops* attended ſome Days in the late Convention; and yet they neither acknowledged the Authority that ſummoned it; nor concurred with it in its Reſolutions. The Doctor adds, *He did not make his Speech, till the Cloſe of the Parliament; and from thence inferrs, that he was preſent in the preceding Part of that Seſſion, when many of* Richard II.'s *Acts were repealed.* This is juſt as good an Argument, as the former; in which he takes it for granted, that every Lord gives his actual Conſent to every Act, that paſſes. Beſides, how does he know, that this Speech was made at the Cloſe of the Parliament? And if it was, why muſt it from thence follow, that he was preſent in the Beginning of it? Theſe are all meer Conjectures, without any Support from Hiſtory; and therefore may as well be denied by others, as they are affirmed by the Doctor. Laſtly, The Doctor urges it againſt this Biſhop, *That he afterwards pleaded the Pardon of* Henry IV. *for a Conſpiracy againſt him, for which he ſtood condemned to die.* And what is the Conſequence the Doctor would draw from thence? Does it follow, that he thereby acknowledged him to be a Rightful King; or engaged himſelf to be his true and faithful Subject for the future? Might not a Man condemned by *Cromwell* for ſerving King *Charles* II. have pleaded a Pardon granted by that *Uſurper*, without the Imputation of owning his Authority? Or is it abſolutely neceſſary in ſuch a Caſe, that a Man ſhould be hanged, in order to ſhew his Loyalty? For what other Event can be expected, if he muſt accept of no Pardon; which, it often happens, muſt be pleaded, before it becomes effectual? But how comes the Doctor to know, that Biſhop *Merks* ever pleaded *Henry* IV.'s *Pardon?* In what Writer or Hiſtory is it to be found? Mr. *Rymer* (to (*i*) whoſe Collections he referrs his Reader) only gives us the Copy of the *Pardon*, without any Intimation, that he ever pleaded it; ſo that we are yet to ſeek for Authority for this Piece of Hiſtory. It may be, the Doctor thinks, there could be no other Motive for this Pardon, but only the Aſſurance he had given *Henry* IV. of becoming his good Subject for the future: But why then was it not inſerted in the Pardon? Why was that Reaſon omitted? Inſtead of which, the only Cauſe

(*i*) *Defence*, p. 39.

Cause assigned for that *Act of Grace*, is (*k*) the great Reverence that King had for the *Pontifical Dignity* and *Character*. After all, the Doctor (*l*) thinks this Bishop *inexcusable in taking up Arms; since the Earl of* March *(for whose Sake only, as Right Heir to* Richard II. *it was lawful to levy War against* Henry IV.) *never set up his Claim to the Crown, in all that Reign*; and his Exclamation upon this Occasion is not a little insulting: *What then becomes of Bishop* Merks? But what becomes of the Doctor, if *Richard* II. was alive at that Time, when this Bishop appeared in Arms against *Henry* IV; is it not then evident, that our exact Historian is subject to the same Frailties he charges upon his Adversaries? Now that *Richard* II. was then alive, is certain from undoubted Authorities. For, *First*, We have the Testimony of one, that (*m*) flourished in those Times; who says it expresly, that when *Bishop* Merks's *Party was defeated, King* Richard *was so mortified at the News of that Misfortune, that (as was reported) he voluntarily famished himself.* And, *Secondly*, To put this Matter out of Question, we have the Word of *Henry* IV. himself, in the (*n*) forementioned Charter of Pardon; in which it is said, the Bishop's Crime was *conspiring with* Thomas Blount, Bennet Sealy, *Knights, and many others condemned at* Oxford, *to restore King* Richard. It was *Richard* II.'s Title therefore, not the *Earl of March*'s, which the Bishop was concerned to defend; and consequently his Observation about that Earl's Submission to *Henry* IV. is nothing to his Purpose, were it true: And whether it is so or not, shall be examin'd in its proper Place.

I SHALL beg Leave to conclude this *Defence* of Bishop *Merks*, with that short History of him, which my Lord Chief Justice *Coke* has inserted in his *Institutes*. (*o*) *At the Parliament holden the First Year of* Henry IV. *on the first* Thursday *after the Bishop of* Canterbury *had*

(*k*) Rymer's Fœdera, &c. Tom. 8. p. 165. Nos attendentes, qualitèr præfatus Thomas Merk Pontificalis dignitatis characterе est insignitus, & divino cultui quasi in summo gradu mancipatus, & volentes proinde ob Dei reverentiam, & statûs sui fastigium, rigorem Justitiæ Regalis Clementiæ mansuetudine temperare, opinantes indubiè magis Deo gratum existere interdum misereri & parcere, quàm continuè judicium sanguinis exercere, de Gratiâ nostrâ, &c. Pardonavimus eidem Episcopo, &c.

(*l*) *Defence*, p. 4.

(*m*) Walsingham, Hist. Angl. in Hen. 4. p. 363. Richardus cùm audiisset hæc infortunia, mente consternatus semet ipsum extinxit inediâ voluntariâ, ut fertur. *See also*, J. Hall's *Chronicle*, Fol. 13.

(*n*) Rymer. Fœdera, Tom. 8. p. 165.

(*o*) Part 2. c. 15. de Artic. Cler.

willed

willed the Lords, that in no wise they should disclose any thing, that should be there spoken; the Earl of Northumberland *demanded of the Lords, what were best to be done for the Life of* Richard II. *Thus far are the Words of the Roll of the Parliament. At this Time spake that worthy Prelate* (p) John Merks, *Bishop of* Carlisle; *and* (q) *said, That they ought not to proceed to any Judgment against King* Richard, *for Four Causes.* First, *That the Lords had no Power to give Judgment upon him, that was their Superior, and the* Lord's *Anointed.* Secondly, *That they obey'd him for their Sovereign Lord and King Twenty Two Years, or more.* Thirdly, *If they had Power to give Judgment against him, they ought in Justice to call him to his Answer; for that (said he) is granted to the cruellest Murderer, or errantest Thief in ordinary Courts of Justice.* Fourthly, *That the Duke of* Lancastre *had done more Trespass to King* Richard *and his Realm, than King* Richard *had done to him or them,* &c. *and desir'd, that if they would proceed against him, the Names of them, that so would proceed, might be entred into the Parliament Roll. It is true, that the Parliament Roll omitteth this Speech of the Bishop; but it appeareth by the Parliament Roll, that the Lords proceeded against King* Richard, *and adjudged him to perpetual Prison; whose Life they would by all means to be saved, as the Roll reporteth. The Names of the Bishops, and Lords, and Knights, that assented, are set down, as the Roll of the Parliament reports; so as it seemeth, that the stout and resolute Speech of the worthy Bishop wrought some Effect. For this Speech he was arrested by the Earl Marshal; and being for a small time committed to the Custody of the Abbot of St.* Albans, *was soon delivered.* (r) *Against him never any Judicial*

(p) *It should be* Thomas Merks.

(q) *The Original known Authority, upon which the Truth of this Story of the Bishop of* Carlisle *and his Speech depends, is* J. Hall's *Chronicle, written in* Henry VIII.'s *Reign; but that Historian does not tell us the certain Time, when this Speech was delivered; and therefore, tho' the Doctor will have it, that it was at the Close of the Session; and Sir* Edward Coke *believes he has rightly guessed at the true Occasion of it; yet it is possible, for any thing that appears to the contrary, that it might have been delivered at the Beginning of that Parliament; and the rather, because the Roll sets down the Name of the Lords Spiritual and Temporal, who voted at the Time Sir* Edward Coke *mentions; among which the Bishop of* Carlisle's *does not occurr.*

(r) *Tho' it does not appear, that any Judicial Proceeding was had against the Bishop of* Carlisle *for this Speech; yet we are very well assured, that within two Months after* Henry *the Fourth's Accession to the Crown, he was deprived of his Bishoprick of* Carlisle, *and translated to a poor one of little or no Value, by the* Pope's *Authority; this is affirm'd by* Walsingham. (Hist. Angl. in Hen. IV. p. 364.) *And we find the Temporalties of* Carlisle *were order'd to be surrendered to* Will. Strickland, 15. Novemb. primo Hen. Quarti. (Rymer. Fœdera, &c. Tom. 8. p. 106.) *In* January *following we meet*

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Pro-

Proceeding was had for this Speech in Parliament. But this Bishop, transported with Excess of Zeal, and affectionate Desire of the Enlargement and Restitution of King Richard, *was Party and Privy to the Conspiracy of* Thomas Holland *Earl of* Kent, John Holland *Earl of* Huntington, John Montacute *Earl of* Salisbury, Edward *Earl of* Rutland, Thomas *Lord* Spencer, *&c. for which he was indicted of High Treason, arraign'd, try'd, and had Judgment, as in Case of High Treason; but the King pardon'd him, and set him at Liberty.* Such was the Opinion this great Lord Chief Justice had of Bishop *Merks*; in Consideration of which, together with the other Remarks I have now made upon his Case, I shall take the Liberty to believe, he never swore Allegiance to *Henry* IV. notwithstanding (*s*) the Doctor's Confidence, that *there were no Nonjurors in his Reign.* I shall only now add, for the Doctor's particular Information, that tho' he is pleased to censure this Bishop's Appearance in Arms against *Henry* IV. as a Breach of his Oath, and an Act of Rebellion; yet the Records of Parliament speak of it in a different manner; for (*t*) there it is said, *That all those, that levied War with the Earl of* Salisbury, *the Lord* Despenser, *&c. did therein perform their Faith and Allegiance to their Liege Lord King* Richard, *according to their Duty to* God, *and to the Laws and Customs of the Realm of* England. I hope, after so ample a Declaration in Parliament, in Defence of this Bishop, the Doctor will no more disturb his Ashes; but suffer him to enjoy quietly that Honour and Reputation, which has hitherto been thought his Due.

And now the Doctor must give me Leave to complain a little of his Severity to his Adversaries; for he has imposed it as a Task upon them, *That they should prove, there were any Nonjurors in the Times of his Kings* de Facto: And with much Assurance he seems to (*u*) boast,

with him in the Tower, (Rymer, ibid. p. 121.) *from whence, in* June, *he was committed to the Custody of the Abbot of* Westminster. (Rymer, ibid. p. 150.) *Now this early Deprivation from his Bishoprick cannot, with Probability, be attributed to any other Cause, besides the Liberty he took in his Speech, or his Refusal to do Homage to* Hen. IV: *For the Treason, for which he was indicted, was not committed, till after St.* Nicolas *Day, which was the 6th of* December. (Rymer, ibid. p. 165.) *and, consequently, his Deprivation bore Date before it. It may be here observed, how highly the Pope favoured* Henry *the Fourth's Title; since He deprived Bishop* Merks *for not submitting to him; and that contrary to an express Act of Parliament, made by* Richard II. *against Translations of Bishops by the Papal Authority.*

(*s*) *View*, p. 2. *And Defence*, p. 33, 34.

(*t*) Rot. Parl. 1 Edw. 4. & 32.

(*u*) *Defence*, p. 33, 34.

that they had not succeeded in their Attempt. Surely this is a rigorous Exaction, and unworthy of the Doctor's Equity and Moderation; for at this rate we must be obliged to prove Mens Honesty and Innocence, which by the established Rules of Justice ought always to be presumed. Besides, we are at present in *Possession*, (a Consideration, which ought to be of some Weight with the Doctor) for till he was pleased to cast the first Stone at this worthy Bishop, a clearer Character had never been transmitted in History, than what he enjoy'd; and that purely upon the account of his Loyalty and Fidelity to his Rightful King. We may therefore take it for granted, that he really was, what he has hitherto, without the least Contradiction, been represented to be, a *Man of Conscience and Integrity*; and leave it to the Doctor's Skill and Management, to give Light to those Spots and Blemishes, he pretends to have discovered in him. For the same Reason I may be allowed to believe, there were many more *Nonjurors* among the great Men, that took up Arms against *Henry* IV. or lived in his Reign, till the Doctor produces his strong Arguments to the contrary. But however, that I may not omit any thing, which the Doctor thinks necessary for his Satisfaction; I will give him another Instance of an eminent Person, who chose to lose a great Employment, rather than submit to *Henry* IV. as his Lawful King; and that was (x) *Sir* John Cary, *Chief Baron of the Exchequer*, at the Time of *Richard* II.'s Deposition; who was banished by that Prince for no other Reason, but because he would never own his Authority. This Case, I presume, will merit the Doctor's Consideration; for here we have a Judge so little acquainted with the *Doctor's Constitution*, that he suffers himself to be deprived of his Fortune and Country, rather than he would do *Fealty* to a King *de Facto*. I may likewise add, that (y) several Clergymen were in Arms against *Henry* IV; and the (z) *Friars Minors* did generally favour that King's Enemies: Now I should think it allowable to call these *Nonjurors*; since in those Days the Inferior Clergy were not oblig'd to take Oaths of Allegiance. Upon which account, I must confess, it is not a little surprizing to me, to find the Doctor so often calling upon his Adversaries, to produce the Names of *Nonjurors* throughout the Reigns of his Kings *de Facto*;

(x) *Prince's* Danmonij illustres, p. 152.

(y) Rymer. Fœdera, Tom. 8. p. 333.

(z) Walsingham Hist. Angl. p. 366.

as

as if every individual Subject had been obliged to take the Oath of Allegiance in those Days; or all those, that had taken it, were influenced by the Doctor's Principle, that *Allegiance is due to every King in Possession*; the contrary to which Assertion I have already in some Measure shewn; and shall do it more fully in the Sequel of this Discourse. The Doctor indeed would persuade us, that (*a*) *William the Conqueror made every Inhabitant in* England *do Homage, and swear Fealty to him*. But if he had given himself Leave to consider fully of this Matter, he would have been satisfied, that *Ingulfus* (the Author cited by him) could not mean, that all Persons, without Exception, took these *Oaths of Fealty*; but only the King's principal Tenants, and other *great Men*, who held Lands upon Secular Services, and therefore were called *Homines Regis*: That is, such only (which the Doctor presently after confesses) as had Lands described in *Doomsday Book*. Now it is certain, the Inferior Clergy were bound by none of these Tenures; but held, whatever Lands and Possessions they had, in *Frank Almoigne*; (*b*) by Vertue of which they were excused from *Fealty*, and all manner of Services, besides that of Praying for their Patrons. This Privilege was afterwards (*c*) secured to them by the Fourth *Lateran Council*, under *Innocent* III; and that Council being received, and approved of in the Council of *Oxford* (held under Archbishop *S. Langton*, and ratified by King *Henry*) the Clergy were never disturbed in the Enjoyment of these Rights, till the Times of the Reformation: So that there could be no *Nonjurors* among the great Body of the Clergy of *England*, under any of the Doctor's Kings *de Facto*. And to what Purpose then does he so often ask, *Who were the Nonjurors in those Reigns?* Had the Clergy of *England* enjoy'd this Privilege at the Time of the late *Revolution*; near Four

(*a*) *View*, p. 2.

(*b*) J. Selden. in notis ad Eadmerum, p. 203. Frankalmoigne, seu Liberam Eleemosynam vocitamus, quæ ad ordinem sacrum tantummodò spectat, & neque censum, neque Fidei, quam diximus, professionem, sed precum solummodò in Patronorum, seu Dominorum salutem effundendarum officium à clientibus exigit; ita tamen ut Civili Foro Cliens de eâ re sisti non possit. In cæteris formulis quotquot apud nos aut etiamnum extant integræ, aut vestigia sua reliquêre, solennis Fidei professio Sacramentò firmata jure exigitur, &c.

Coke's *Inst. Part* 1. l. 2. c. 6. Sect. 135. *They that hold in* Frank Almoigne *shall do no Fealty to their Lord; and the Lord is excluded from having any earthly or temporal Services of them.*

(*c*) *Mr.* Dodwell's *Considerations of present Concernment*, p. 166, 175, 183, 184.

Hundred

Hundred of them had quietly continued in the Possession of their Livings, of which they were for no other Reason deprived, but because they were *Nonjurors* : And might not the next Age then have demanded, as the Doctor does of the Times beforementioned, *Who were the Nonjurors at the Revolution?* For besides Eight or Nine Bishops, and a lesser Number of Temporal Lords, it may well be questioned, whether the rest of the Gentlemen of the Laity, who refused the Oaths, will be remember'd in our Histories. Neither were the Clergy the only Persons exempted from taking Oaths of *Fealty* in the *Conqueror's* Reign; but also all those, that held Lands in (*d*) *Allodio*, of which we (*e*) meet with frequent Mention in *Doomsday Book*. Besides, who were these *great Men*, that did *Homage* to the *Conqueror?* The *Bishops and Abbots*, &c. mention'd by *Hoveden* to have sworn to him at *Salisbury*. Had they been *Saxons*, it might have serv'd the Doctor's Purpose, supposing him to be only a King *de Facto:* But it is worth observing, that this happen'd towards the latter End of his Reign; at which Time all the old *English* Inhabitants of Note had been dispossessed in a manner of their Estates and Fortunes; and the *Normans* were generally seized of the Lands of the Kingdom, together with all the great Offices and Employments, Ecclesiastical, as well as Civil. This is so notorious a Truth, that none can be ignorant of it, that are but slenderly acquainted with the Historians of that Time. (*f*) *Ingulfus* assures us, *That King* William *distributed the Earldoms, Baronies, Bishopricks, and Prelacies of the whole Land to his* Normans; *and hardly suffer'd an* Englishman *to arrive to any Degree of Honour or Power.* And he adds, *The* Normans *now hated the* English *at that rate, that whatsoever their Merit might otherwise be, they*

(*d*) J. Selden in Notis ad Eadmerum, p. 203. *Allodia* etiam omni Fidei, quæ juramento præstito fieri solet, professione libera sunt.

(*e*) *Dr.* Brady's *Hist. of* England, Vol. 1. p. 67. *and* 204.

(*f*) Ingulfus, p. 70. Wilhelmus R. Comitatus, Baronias, Episcopatus, & Prælatias totius terræ suis Normannis distribuit, & vix aliquem Anglicum ad honoris statum vel alicujus dominii Principatum ascendere permisit. ------ Tantùm nunc Anglicos abominati sunt Normanni, ut quantocunque merito pollerent, de dignitatibus repellerentur, & multò minus habiles Alienigenæ, de quâcunque aliâ natione, quæ sub cœlo est, extitissent, gratanter assumerentur. Ipsum etiam idioma tantùm abhorrebant, quòd Leges terræ statutáque Anglicorum Regum Linguâ Gallicâ tractarentur, & pueris etiam in Scholis principia literarum Grammatica Gallicè, non Anglicè traderentur, &c. *More to this purpose may be found in* Ord. Vitalis, l. 3. p. 507, 520, 523. *and* Henry Huntingdon, l. 6. p. 370.

depriv'd

depriv'd them of all Dignities, and sent for worthless Foreigners from all Parts to fill their Places. And it is evident from *Doomsday Book*, that most of the Lands of *England* were then possessed by *Normans*; and consequently few besides were under any Obligation to take Oaths to the *Conqueror*. Lastly, It should be consider'd, that many of the *English* Nobility and Gentry, *&c.* voluntarily left the Kingdom in the Beginning of that Prince's Reign, before the Time, in which he is said to have tender'd the Oaths to his Subjects. A great Part of them fled into *Scotland*; some into *Denmark* and *Ireland*; and others (*g*) went to *Constantinople*; where they were well receiv'd, and kindly entertain'd by the Emperor *Alexius*. Now I leave it to the Doctor to judge, whether all these voluntary Exiles may not properly be esteem'd *Nonjurors*, since they chose to leave their Country rather, than they would submit to the *Conqueror*. But supposing it to be true, that every Man in *England* had taken the Oaths to the *Conqueror*, and those of his Successors, whom the Doctor calls Kings *de Facto*; is he sure they did this upon a full Persuasion and Conviction, that Allegiance was due to them upon the Sole Account of their being in the Throne? The Doctor knows very well, that many of the chief Nobility, and great Numbers of the Gentry were in Arms against *Henry* IV. chiefly for this Reason, because he was not their *Lawful King*. Now this was a plain Declaration, that they thought the Oath they had taken to him, did not oblige them; and consequently it is evident, they had no Notion of

(*g*) Ord. Vitalis, l. 4. p. 507. Ultro in exilium aliqui profugiunt. Quidam longinquas Regiones adierunt, & militiæ *Alexij Imperatoris Constantinopolitani* sese audacter obtulerunt. Et p. 508. Exules igitur *Anglorum* favorabiliter à *Græcis* suscepti sunt, & *Normannicis* legionibus, quæ nimiùm *Pelasgis* adversabantur, oppositi sunt. Augustus Alexius urbem, quæ *Chevetot* dicitur, Anglis ultra *Byzantium* cœpit condere; sed nimirùm infestantibus *Normannis*, eos ad urbem Regiam reduxit, & eisdem Principale Palatium cum Regalibus thesauris tradidit. Hâc igitur de causâ *Saxones Angli* Ioniam expetierunt, & ipsi ac hæredes eorum sacro Imperio fidelitèr famulati sunt, & cum magno honore inter Thraces Cæsari, senatui, populóque chari usque nunc perstiterunt. Et vide l. 7. p. 641. & l. 9. p. 725. *And for their good Services in that Country, they were for many Years made choice of for the Emperor of* Constantinople's *Guard. See Mr.* Camden's Britannia, *in the Chapter concerning the* Normans. *And to this purpose is Mr.* Selden's *following Observation*; (Mare clausum, l. 2. c. 1. p. 184. Engl. Fol.) *In Times past the Emperor of* Constantinople *was wont to have trusty Guards called* Barrangi, *constantly attending his Person, who were taken out of* England, *as appears out of* Nicetas Choniates, (Hist. Græc. l. 2.) *And* Codinus *also, who was Keeper of the Palace, writes*, (De Officiis Constantinop.) *That they were wont to salute the Emperor with a loud Voice*, Ἰγκλινίσι, *in the* English *Tongue:* Vide etiam Du Cange Gloss. voce Barrangi.

the Doctor's Constitution: For had that been a known and established Doctrine, it is absurd to imagine, so many eminent Persons should agree in assigning that for the main Ground of their Quarrel, which was most directly contrary to Law, and therefore as unpopular a Reason, as could possibly be given. When Men take up Arms against the Government they have liv'd for some Time peaceably under, they have always thought it prudent to justify such Actions by specious and plausible Pretences; and, I believe, it will be hard to instance in any Insurrection, which has not appeal'd to Law and Equity, for Countenance at least, if not Encouragement. But if the Doctor's Opinion is to prevail, there could not be a more impudent Rebellion, than that, which was maintained against *Henry* IV. since it was grounded upon this *illegal Position*, *That he was not King* de Jure, *though he was in full Possession of the Kingdom.* Upon this Presumption therefore, that Men cannot act so contrary to the Principles of common Sense, as to engage in a Conspiracy against an establish'd Government, upon Reasons notoriously contradictory to that *Constitution* they pretend to maintain; the Doctor's Adversaries have taken the Liberty to affirm, that his Doctrine was not known in *Henry* IV.'s Reign: And what now does the Doctor answer to this? Why, he (*h*) tells us, *First*, That it could be no better, than a sham Pretence, if ever made use of by them; for the Right Heirs had all submitted to *Henry* IV; and therefore *certainly it was no small Crime for Subjects to begin a War with their Prince, and throw a Nation into Blood and Confusion, when they had no Reason for it; and this was what they did, and what they had no Reason to do*, &c. And, *Secondly*, He says, that *Owen Glender*, the Earl of *Northumberland*, &c. did not make War against *Henry* IV. for the Sake of the Right Heir, but upon quite different Motives.

(*h*) *Defence*, p. 45, 48.

First, He affirms, that the Right Heirs to the Crown had all submitted to *Henry* IV; and therefore the Taking up Arms against him upon the Pretence of their Title, was unreasonable, and unjustifiable. But did the Doctor consider, that the first Conspiracy against *Henry* IV. was during the Life of *Richard* II, in order to restore him to the Crown? And will he say, that the Resignation made by that Prince, during his Imprisonment, was free

free and voluntary, and such as effectually released his Subjects from their Allegiance to him? I know very well, that *Richard* II. was prevail'd with to declare, that his *Resignation* was voluntary; and I am not ignorant, that it is thus enter'd upon the *Rolls of Parliament*: But I have a better Opinion of the Doctor, than to believe, he will so far approve of that infamous Act of Violence and Injustice, as to attribute any Authority to it; if he should, I must referr him, for his Satisfaction, to the Records of Parliament, where he will find the following remarkable Passages, very worthy of his Regard; and therefore fit to be frequently recommended to his Consideration. (*i*) *And where certain Persons of evil, riotous, and seditious Disposition, joyed in Rumour and rebellious Novelties, adhering to* Henry IV. *late in Deed, and not of Right, King of* England, *after his Unrighteous, Unlawful, and Detestable Usurpation and Intrusion, against his Faith and Liegeance to King* Richard II. *his Righteous, True, and Natural Liege Lord, murder'd with great Cruelty and horrible Violence, in an outrageous and heady Fury, the Right Noble and Worthy Lords,* John Montague, *late Earl of* Salisbury; *and* Thomas, *late Lord* Le Despenser, *and other true Subjects and Liegemen of the said King* Richard, *&c.* . . . . . *Item.* Ralph Lumley, *and others, were cruelly slain and murder'd by* Henry IV, *in Deed, and not of Right, King of* England, *for the true Faith, Duty, and Allegiance, that they bare to the Right Noble Prince King* Richard II, *&c.* By Virtue of which Authorities I shall venture to say, that those, who took up Arms for *Richard* II. (notwithstanding his *pretended Resignation*) had a good and righteous Cause; and therefore the Doctor has unjustly cast upon them the Aspersion of being *seditious*, and *unreasonable* Men. Well; but after *Richard* II.'s (*k*) Death, he is confident the following Insurrections against *Henry* IV. were not capable of any Justification; for the *Earl of* March (the only Person who could pretend to a Right to the Crown) *never laid any Claim to it*: (*l*) *So far from it, that he took the Field for* Henry IV, *against* Owen Glendor; a Sign he had surrender'd his Title.

(*i*) Rot. Parl. 1. Edw. 4.

(*k*) *Defence*, P. 47, 48.

(*l*) Ibid. P. 45.

Now, with all the Doctor's Accuracy, I am afraid he is unfortunate in this Piece of History: For (*m*) *Roger* Earl of *March* dying at the End of *Richard* II.'s Reign, his

(*m*) *Sir* W. Dugdale's *Baronage*.

his eldeſt Son *Edmund* was then but Six Years old; and conſequently (*n*) under Ward all *Henry* IV.'s Reign: And Sir (*o*) *William Dugdale* tells us farther, that he was but Ten Years old, when he headed the *Hereforddſhire* Men in Oppoſition to *Owen Glendor*; an Age certainly too young, to render the Reſignation of a Crown of any Validity. Beſides, why muſt the Earl of *March*'s Heading an Army againſt *Owen Glendor*, be neceſſarily interpreted, as a Declaration in Favour of *Henry* IV.'s Title? The Doctor ſhould remember, that King *Henry* was not of his Opinion; for when he was ask'd to ranſom (*p*) the Earl of *March*, (who had been taken Priſoner by *Owen Glendor* in that Action) (*q*) he made Anſwer, That the Earl of *March* was not taken Priſoner for his Service; but willingly ſuffer'd himſelf to be taken Priſoner, becauſe he would not act againſt *Owen Glendor*; and therefore he would not ranſom him, nor redeem him. But to put this Matter for ever out of Diſpute; we have an Act of Parliament upon Record, which expreſly commends thoſe, who (after (*r*) King *Richard*'s Death) continued their Faith and Liegeance, according to their Duty to God, and to the Laws and Cuſtoms of the Realm of *England*, to *Edmund Mortimer*, then Earl of *March*, (*s*) next Heir of Blood to the ſame King *Richard*. And likewiſe it is there ſaid, that *Ralph Lumley* and others were cruelly ſlain and murder'd by *Henry* IV. in Deed, and not of Right, King of *England*, for the true Faith, Duty, and Allegiance, that they bear to the

(*n*) *This is evident from Mr.* Rymer's Fœdera & Conventiones, &c. Tom. 8. *For* p. 268. 3° Hen. Quarti, A. D. 1402. *Sir* Hugh Waterſon *is appointed Governour of the King's young Children, and alſo of his Kinſmen the Earl of* March *and his Brother: And*, p. 591. 10° Hen. Quarti, *the Cuſtody of ſeveral Mannors in* Dorſetſhire *is granted to* Henry *Prince of* Wales, *till* Edmund Mortimer *Earl of* March *is of full Age*. P. 608. *The Earl of* March *and his Brother were firſt committed to the Cuſtody of Sir* John Pelham, *allowing him* 500 *Marks every Year; but* Henry IV. *in the Tenth Year of his Reign, commits them to the Cuſtody of his eldeſt Son, granting him the ſame annual Sum. And*, vide p. 639. Jo. Harding *alſo in his Chronicle*, cap. 194, 196. *ſays*, Roger *Earl of* March *being ſlain in* Ireland, 22° Ric. 2. *left two Sons very young*. J. How *ſays the ſame*; Annals, p. 319.

(*o*) *Sir* William Dugdale's *Baronage*.

(*p*) *It is obſervable, that King* Henry *took care to appoint Commiſſioners to treat with* Owen Glendor *for the Ranſom of the Lord* Grey *of* Ruthin, *ſoon after he was taken Priſoner; by which means he was quickly ſet at Liberty for* 10000 *Marks*. Rymer's Fœdera, &c. Tom. 8. p. 279. *His Refuſing therefore to do the ſame for the Earl of* March, *could proceed from no other Reaſon, but this Jealouſy of him, or his Friends*.

(*q*) Hall's *Chron.* fol. 20. *and* Holinſhead, p. 521. Walſingham, (ad A. D. 1402.) *ſays, The Earl of* March *was then taken*, proditione mediante. Stow *ſays, That, when it came to Martial Affairs, the Earl of* March's *own Archers turn'd their Hands againſt them they ſhould have defended*. Stow's Annals, p. 327.

(*r*) Rot. Parl. 1. Edw. 4.

(*s*) Ibid.

right

Right Noble Prince King *Richard* II. in his Days; and after his Decease, unto *Edmund Mortimer*, late Earl of *March*, &c. I leave it now to the Doctor to consider, whether those Noblemen, who took up Arms in Defence of the Earl of *March*'s Title, *were guilty of no small Crime, and had no reason for so doing*, which yet he has been pleased with great Assurance to affirm.

Secondly, He (*t*) maintains, that *Owen Glendor*, the Earl of *Northumberland*, &c. did not make War against *Henry* IV. for the Sake of the Right Heir; but upon quite different Motives. Let us now therefore enquire into the Truth of this Assertion. He (*u*) says, *That* Owen Glendor's *War began with a Riot, and ended in Rebellion.* Now, though I am not at all concerned, whether this be true or no; yet if any thing can be said in that *Welsh* Gentleman's Vindication, I hope I may do him Justice without Offence. I shall beg Leave therefore to recommend the Perusal of the following Passage, extracted out of the Notes of the Learned and Judicious Antiquary, *Robert Vaughan* of *Hengwrt* Esq; (*x*)

'Sir *David Gam* (*y*) was wholly devoted to the Interest 'of the Duke of *Lancastre*; upon which account it was, that '*Owen ap Gryffydh Vychan* (commonly called *Owen Glyn-Dŵr*) 'was his mortal Enemy. This *Owen* had his Education at 'one of the Inns of Court, and was preferr'd to the Service 'of King *Richard* II, whose *Scutifer* (as *Walsingham* says) he 'was. *Owen* being assured, that his King and Master *Richard* was Deposed and Murder'd, and withal (*z*) provoked by several Affronts, and Wrongs done him by the 'Lord *Grey* of *Ruthin* his Neighbour, whom King *Henry* very much countenanced against him, took Arms; and looking upon *Henry* as an Usurper, caused himself to be proclaim'd Prince of *Wales*. And tho' himself were (*a*) de-

(*t*) *Defence*, p. 45, 48.

(*u*) Ibid. p. 45.

(*x*) *See Mr.* Lhwyd's *Additions to* Brecknockshire, *in the last Edition of* Camden's Britannia.

(*y*) 13° Hen. Quarti, *Luellyn ap Howell, the Father of* David Gam *Esq; procures a Commission from* Henry IV. *to treat with* Owen Glendor *for the Ransom of his Son* David Gam, *then* Owen's *Prisoner.* Rymer's Fœdera, &c. Tom.8. p.753.

(*z*) *Dr.* Powell, *in his History of* Wales, *assures us, That the Quarrel between the Lord* Grey *of* Ruthin *and* Owen Glendor *first broke out in* Richard *the Second's Time; and that the Lord* Grey *presuming upon* Henry *the Fourth's Favour, was guilty of the first Acts of Hostility against* Owen Glendor: *If this Account is true, the Doctor is much misinformed, when he makes* Owen *the Aggressor, and Author of this* Riot, *as he is pleased to call it, in* Henry *the Fourth's Reign. See his Defence*, p. 45.

(*a*) *Dr.* Powell *says the same, in* Owen Gwyneth, p. 213. *but then he confesses*, (ibid.) *that he was descended by Females from* Owen Gwyneth *Prince of* North-

'ſcended paternally but from a younger Brother of the 'House of *Powis*; yet (as Ambition is ingenious) he finds 'out a Way to lay Claim to the Principality, as deſcend-'ed (by a Daughter) from *Lhewellyn ap Gryffydh*, the laſt 'Prince of the *Britiſh* Race. He invaded the Lands, 'burnt and deſtroyed the Houſes, and Eſtates of all 'thoſe, that favoured and adhered to King *Henry*, &c."

If this Account may be rely'd on; whatever Rebellion *Owen Glendor* was guilty of, certainly it could not be againſt *Henry* IV; for he never own'd him for his King; much leſs did he ever ſwear to him. And it is obſervable, that in ſome of thoſe Papers, ſigned by him as Prince of *Wales*, (which are preſerved and printed by Mr. *Rymer*, in his Volumes of *Fœdera*, *Conventiones*, *&c.*) he never calls him *(b)* other, than Duke of *Lancaſtre*. With reſpect therefore to *Henry* IV, he was truly a *Non-juror*; and cannot be charged as a Revolter; a Name, which the Doctor thinks he has a Right to beſtow upon all, that took up Arms in this Reign. It may be ſaid indeed, that his Taking upon himſelf the Title of *Prince of Wales*, and dating all his Writings according to the ſeveral Years of his *Principatus*, was no leſs, than an Invaſion of the Sovereignty of the Kings of *England* over *Wales*; and therefore may well be term'd an Act of Rebellion: But if it was ſo, he was anſwerable for it only to the Earl of *March*, to whom only he could be a Rebel, and not to *Henry* IV. And then it deſerves to be conſider'd, whether the Earl of *March*'s *(c)* voluntary Surrender of himſelf to *Owen*, (if *Henry* IV. himſelf is to

Wales, *and by his Mother from* Rees ap Theodor *Prince of* South-Wales, p. 216. Leland (Itinerar. Vol. 5. p. 36.) *makes him to be deſcended from* Llulin ap Jorwarth *Prince of All* Wales, *by a Daughter.*

(*b*) *Particularly in the Treaty made between* Owen Glendor (*by his Ambaſſadors* Griffin Young *Dr. of Laws, and* John Hanmer *his Couſin and Eſq*;) *and the King of* France, *they expreſly unite themſelves againſt* Henry *of* Lancaſtre *their common Enemy.* Anno 5 Hen. 4. Rymer. Tom. 8. p. 356, 365.

(*c*) *It muſt be confeſſed, that one of the Reaſons given by the Earl of* Northumberland *and his Son, for their War againſt* Henry IV. *was, becauſe he did not take care to ranſom* Edmund *Earl of* March, *who had been taken Priſoner by* Owen Glendor, *and was at that Time cruelly kept in Priſon, bound with Iron Chains: From whence it may well be inferr'd, that* Owen *could not then be a Friend to the Earl of* March's *Cauſe, who had ſo little Reſpect for his Perſon. All that I can ſay in this Matter is, That* Henry IV. *(in the Paſſage before cited) believed the contrary; and alledged it as a Reaſon for his not ranſoming that Earl, that willingly and deſignedly he threw himſelf into* Owen's *Hands; which being allowed to be true, it is not eaſy to conceive, that* Owen *ſhould lay him in Chains. Beſides,* Walſingham *ſays expreſly,* (p. 367.) *That the Earl of* March *join'd with* Owen *againſt King* Henry, *and alſo married* Owen's *Daughter; but this laſt Particular is not much to be credited, upon the account of the Earl's Age; tho' I find* Holinſhead *believes it,* p. 521. *and* Stow, p. 320.

be

be credited) and the *(d)* good Correſpondence between that *Welſh* Gentleman and my Lord *Percy*, (the profeſſed Friend of the foreſaid Earl, as I ſhall ſhortly ſhew) may not amount to a Probability, that he preſumed upon the Rightful Heir's Conſent (as far as he was then capable of giving it) for aſſuming that high Title. This is what I think may juſtly be pleaded in Behalf of *Owen Glendor*; and if this Point is allowed me, I ſhall then think it no longer a Queſtion, whether his Quarrel againſt *Henry* IV. was chiefly founded upon that King's Uſurpation; which the Doctor has thought fit utterly to deny. *(e)* From all which duly conſidered, I may juſtly inferr, that the *Welſhmen* at that Time were a very formidable Body of *Nonjurors*; being *(f)* entirely united in their Enmity againſt the Houſe of *Lancaſtre*, not only in *Wales*, but in every Part of *England*, where they reſided. For *(g)* we find it complain'd of in Parliament, that the *Welſh* Scholars in both Univerſities, left their Colleges; and the Apprentices in *London*, and elſewhere, their Maſters, in order to engage themſelves in the Quarrel of *Owen Glendor*. And a few Years after, *(h)* *John Trevor*, Biſhop of *S. Aſaph*, approved ſo well of his Countrymens Cauſe, that he deſerted *Henry* IV. upon that Account.

(*d*) Plac. Coron. 7 Hen. 4. n. 12. *It is ſaid, the Earl of* Northumberland *was in a Confederacy with the Rebels of* Wales. *And* Walſingham *ſays*, (Hiſt. Angl. p. 368.) *That the Lord* Percy, &c. *marched into* Shropſhire *with a Deſign to join* Owen Glendor, *and the Earl of* March; *who is mentioned by Sir* William Dugdale (*from* Stow) *to have been with the Lord* Percy *in the Battle of* Shrewsbury. *See alſo* Rymer's Fœd. &c. Tom. 8. p. 313, 314.

(*e*) *If what* Owen Glendor *pretended had been true, that the Principality of* Wales *belonged to him by Right of Blood; his Caſe would ſtill be more capable of an Apology, whilſt an Uſurper was upon the Throne of* England. *But I find Dr.* Powell *will by no means allow of this Pretenſion*, p. 318. *who affirms, That* Mortimer *Earl of* March *had the beſt Title by Birthright to the Principality of* Wales, *as well as to the Crown of* England, p. 315.

(*f*) *My Lord* Herbert *ſays, the* Welſhmen *adhered to the Houſe of* York; *by which he muſt mean the oppoſite Intereſt to the Houſe of* Lancaſtre. *Life of* Henry VIII. p. 373. *And a great Ornament to the Bench at this Time, has publickly declared his Opinion to this purpoſe, upon a memorable Occaſion. The* Britains, *ſays he, were always Men of Courage and Sincerity, and yet of Reſentment; tho'* Henry IV. *and* Henry V. *were martial Princes; and had a Hatred againſt the* Britains, *becauſe they perſevered in their Duty to* Richard II. *who was their rightful, tho' unfortunate King, and made moſt ſcandalous and reproachful Laws againſt them: Yet it is worth Remark, that thoſe Kings had never peaceable or happy Days, until they reconciled themſelves to that Great People; than whom none had more eminently ſignalized their conſtant Loyalty to their Rightful King. Mr.* Price's *Speech againſt the Grant of Part of the Principality of* Wales *to the Earl of* Portland, p. 14.

(*g*) Rot. Parl. 2 Hen. 4. 15.

(*h*) Walſingham. Hiſt. Angl. p. 370. *and* Godwin de Præſul.

BEFORE

BEFORE I conclude this Story of *Owen Glendor*, I beg Leave to correct a Mistake concerning him, which all our common Chronicles and Histories have fallen into; and that is, (*i*) "That in the Tenth Year of King "*Henry*'s Reign, *Owen Glendor* being driven to such Mi-"sery, that in a manner he despaired of all Comfort; "he fled into desert Places, and solitary Caves, where "being destitute of all Relief and Succour, dreading "to shew his Face to any Creature; and finally, lacking "Meat to sustain Nature, for meer Hunger and Lack of "Food, he miserably pin'd away and died." Now we have very good Evidence, that this Story is false; for in (*k*) the Eleventh Year of *Henry* IV, we meet with Orders to march against *Owen Glendor*, and attack him: (*l*) And in the Thirteenth of the said King a Commission is issued out for the Redemption of *David Gamme* Esq; at that Time *Owen*'s Prisoner. Besides, we are well assured, he survived this Prince, and continued his Hostilities against his Successor; for in the (*m*) Third Year of *Henry* V. a Commission was issued out for a Treaty with him and the *Welsh*, in order to bring them to Obedience; and about (*n*) half a Year after, the same Commission is renewed to Sir *Gilbert Talbot*, to conferr with *Meredyth ap Owen*, the Son of *Owen de Glendourdy*, in order to the Pacifying of the said *Owen*, and the *Welsh* Rebels, by Offers of Pardon, if they desired it, &c. Thus it is manifest *Owen Glendor* was in no despicable Condition in the Middle of *Henry* V.'s Reign: How long he afterwards lived, and in what Circumstances he died, no Histories that I have hitherto met with, do inform us: But there is Reason to believe, he never made his Submission to the House of *Lancaster*; because (*o*) in *Henry* VI.'s Reign a severe Act of Parliament passed, in

(*i*) *These are* Holinshead's *Words*, p. 536. *and* Stow, p. 338.

(*k*) Rymer. Fœdera, Tom. 8. p. 608.

(*l*) Rymer. ibid. p. 753.

(*m*) Rymer. Tom. 9. p. 283.

(*n*) Rymer. ibid. p. 330.

(*o*) Rot. Parl. 9 Hen. 6. 32. *Please it the Lords Spiritual and Temporal, to be remembr'd of the great Insurrections, Rebellions, and horrible Treasons imagin'd and done by* Owen Glendourdy *of* Walys, *against the Royal Majesty of King* Henry, *Aiel to our Sovereign Lord the King that now is, whereof he was indicted*, &c. *Please it you it mowe be ordeyned*, &c. *that all Indictments against the said* Owen *be affirmed*, &c. *and be effectual to bind the Heirs of the said* Owen. ---- *Considering also, that the said Insurrections, Rebellions*, &c. *imagined and done by the said* Owen, *were not only in Destruction, and Anyentissement of the Riall Estate of the said King Aiel, but also of the Prince, that Time our Liege Lord, that last past fro this Life, and of all the Branches of the Stock Riall*, &c. *and finally in Destruction of all* English *Tongue for evermore*, &c.

which

which his Crimes are recited, and all Indictments, Judgments, *&c.* made or given against him, are confirmed.

In the next place, the Earl of *Northumberland*, his Son *Hotspur*, and the Earl of *Worcester* his Brother, fall under the Doctor's Indignation; for he does not scruple to charge their Revolt from *Henry* IV. with Ingratitude, and Envy: And in a word, is very positive, *(p)* they did not act upon Principles of Loyalty to the Right Heir, but quite different Motives. This must be confessed to be an Accusation highly reflecting on the Honour of that very illustrious and noble Family. *Hotspur* especially methinks, might have challenged some Reverence from the Doctor, whose *(q)* Valour is still remember'd with Pride by his Countrymen, and well deserves to be immortal. The Doctor, however, is resolved to give him no Quarter; but as he is the first Enemy, that durst use him so contemptuously; I doubt not, but he will have Reason to repent of his Error, which I shall now endeavour to make him sensible of.

In order to this, I shall beg Leave to lay before the Reader an Extract taken from a *(r)* Manuscript Copy of *John Harding*'s Chronicle, omitted in the printed Edition of that Author; which, together with some additional Observations, will, I imagine, not a little contribute to the Vindication of those noble Lords. The Extract is as follows:

"Forasmuch as many Men mervaile gretely, why "the Erle of *Northumberland*, and Sir *Henry Percy* his "furst begottyn Son, and Sir *Thomas Percy* Erle of *Wor*-"*cester*, were Supporters to King *Henry* IV, to have his "Heritage, and to take King *Richard* to have depose him "by strong Honde: Truly I the Maker of this Book "was brought up fro Twelve Year of Age in Sir *Henry* "*Percy*'s House to the Battle of *Shrewsbury*; where I

(*p*) *Defence*, p. 43, 46, 48.

(*q*) *A greater Proof was never given of the* English *Valour, than in the Battle of* Otterbourne, *otherwise called* Chevy-Chace, (*at the latter End of* Richard *the Second's Reign*) *when* Henry Percy, *alias* Hotspur, *who commanded the* English, *was at last taken Prisoner by* Montgomery, (*Ancestor to the present Earl of* Eglinton.) *In this Action* William Douglas *the* Scotch *General, and the greatest Part of his Army, were slain. This is Mr.* Camden's *Account.* Britannia, *in* Northumberland, p. 850. *The Battle of* Homyldon *was a few Years after fought, by the same Lord* Percy; *in which he routed the* Scots, *and took* Archibald Douglas, *their General, Prisoner.*

(*r*) Biblioth. Harley, 42. c. 11. fol. 152. *Mr.* Camden *also in his History of this Earl of* Northumberland *and his Son, at the End of* Northumberland, *referrs to* John Harding's *Manuscript Chronicle.*

" was with him armed of Twenty Five Yere of Age; " as I had been before at *Homyldon*, *Cokelawe*, and at di- " vers Rodes and Fields with him; and knew his In- " tent, and had it wretyn. Wherefore I have titled in " this Book, that for Truth the Cause, why they rose " agenst him, may evermore be know. Their Quarrell " was so sweet, devout, and by good Advyse and Coun- " seill of Master *Richard Scroop*, Archbishop of *York* (for " whom GOD Almighty hath shewn many Miracles " sith that Time hitherward) and also by Counseill of " divers other Lords, that disteyned him, and were " bound to him by their Letters and Seals, which I " saw and had in kepying, while I was with him. And " all their Quarrell they sent unto King *Henry* in the " Field, wretyn under the Seales of their three Arms, " by *Thomas Knayton* and *Roger Salvayne* Squyers of Sir " *Henry Percy*, which Quarrell now followeth next after.

These Articles are in Latin *in the* MS. *which I have thought fit to translate, tho' they were before printed in* Hall's *Chronicle, and* Grafton.

' WE *Henry Percy*, Earl of *Northumberland*, Constable ' of *England*, and Warden of the West-Marches towards ' *Scotland*; *Henry Percy* our first born Son, Warden of ' the East-Marches of *England* towards *Scotland*, and ' *Thomas Percy* Earl of *Worcester*, Procurators and Pro- ' tectors of the Commonwealth before our LORD JESUS ' CHRIST our Supreme Judge; Do say and affirm, ' and intend to prove personally with our Hands on this ' instant Day against thee *Henry* Duke of *Lancastre*, toge- ' ther with thy Accomplices and Followers, unjustly cal- ' ling thyself King of *England*, without a Title of Right, ' but only by the Treachery and Violence of thy Party: ' That when thou after thy Banishment didst enter *Eng-* ' *land*, and cameſt to *Doncastre*, thou didst then swear to ' us upon the Holy Gospels, then by thee touched and ' kissed, that thou wouldest in no wise claim the King- ' dom or Royal State, but only thy own proper Inheri- ' tance, and thy Wife's in *England*; and that *Richard*, ' who was then our Lord the King, should reign for the ' Term of his Life, being directed by the good Advice ' of the Lords Spiritual and Temporal: But thou didst ' imprison thine and our King in the Tower of *London*, ' until he resigned, through Fear of Death, his King- ' doms of *England* and *France*, and renounced all his ' Right in the foresaid Kingdoms, and other his Lord- ' ships and Lands beyond the Seas. By Colour of which

Resigna-

'Resignation and Renunciation, by the Advice of thy 'Adherents, and the publick Cry of the Common People, brought together to *Westminster* by thy Means, 'and the Help of thy Accomplices, thou didst there 'crown thyself King of the foresaid Kingdoms, and 'didst cause all the Royal Castles and Lordships to be 'seized into thy Hands. Wherefore thou art false and 'perjur'd.

Item, 'We say and affirm, and do intend to prove, 'That whereas thou didst swear to us upon the Holy 'Gospels, at the same Time and Place, that thou wouldst 'never permit any Tenths to be levy'd of the Clergy, 'nor Fifteenths of the Laity, nor any other Taxes to be 'raised in the Kingdom of *England* (*s*) for the King's Use, 'whilst thou livedst, but by the Consent of the Three 'Estates in Parliament; and this only upon a pressing 'Occasion, for the Defence of the Realm, and not o'therwise. Thou, on the contrary, in Contempt of thy 'Oath so taken, hast caused to be levied very many 'Tenths and Fifteenths, and other Impositions and 'Taxes, as well of the Clergy and Laity, meerly through 'a Dread they had of thy Royal Majesty. Wherefore 'thou art false and perjur'd.

(*s*) Ad opus Regium, i.e. *K.* Richard's *Use or Occasions.*

Item, 'We say and affirm, and do intend to prove, 'That whereas thou didst swear unto us upon the said 'Gospels, at the same Time and Place, that our and thy 'Lord, King *Richard*, should reign as long as he lived 'in the Enjoyment of his Royal Prerogatives; thou 'didst cause our and thy Lord King *Richard*, traiterously 'in thy Castle of *Pontfract*, without the Consent or 'Judgment of the Lords in the Kingdom, for fifteen 'Days and Nights (a Wickedness not to be heard by 'Christians without Horror) to remain in Hunger, and 'Thirst, and Cold; and thereby didst kill and murder 'him. Wherefore thou art false and perjur'd.

Item, 'We say and affirm, and do intend to prove, 'That thou at that Time, when *Richard* our and thy 'King was so put to Death in that horrible manner, as 'is before related; thou didst seize and usurp the King'dom of *England*, with the Name and Honour of the 'Kingdom of *France*, contrary to thy Oath; from *Ed'mund Mortimer*, Earl of *March*, the then next and di'rect Heir of *England* and *France*; who Immediately and

Heredi-

'Hereditarily after the Decease of King *Richard*, ought to 'have succeeded. Wherefore thou art false and per-'jured.

Item, 'We say and affirm, and do intend to prove, as 'above; That whereas thou didst swear at the same 'Place and Time, to support and maintain the Laws 'and good Customs of the Kingdom of *England*; and 'afterwards, at the Time of thy Coronation, didst again 'swear to keep and preserve them inviolably; thou 'treacherously and against the Law of *England*, didst 'write to thy Fautors in every County in *England*, to 'choose such Knights for each Parliament, as should be 'agreeable to thy Pleasure: So that in those thy Par-'liaments no Justice could be obtain'd against thy Will, 'upon any Complaints; altho' we had very often peti-'tioned thee, according to the Consciences God had 'given us; for the Truth of which we call God to wit-'ness, and the venerable Fathers *Thomas Arundell* Arch-'bishop of *Canterbury*, and *Richard Scrope* Archbishop of '*York*. Wherefore it behoves us to seek for Remedy, be-'fore our Lord Jesus Christ, by a strong Hand.

Item, 'We say and affirm, and do intend to prove, 'That whereas *Edmund Mortimer* was taken by *Owen* '*Glendor* in mortal Fight, and cruelly by him held in 'Prison and Iron Chains, in thy Cause; whom thou 'didst proclaim to be taken treacherously, and would'st 'not suffer him to be ransom'd, either by thyself, or by 'us his (*t*) Kinsmen, and Friends; whereupon we have 'lately treated with the said *Owen* for his Redemption, 'at our own proper Cost, and for the Benefit of Peace be-'tween thee and him; upon which Account thou didst 'consider us as Traitors; and for the future didst secretly 'contrive our Ruin and final Destruction.

(*t*) *The Lord* Henry Percy, *called* Hotspur, *married the Sister of* Roger Mortimer *Earl of* March.

'For these Reasons we do mortally defy thee, and 'thy Accomplices, and Adherents, as Traitors, and Sub-'verters of the Commonwealth, and Kingdom; and In-'vaders, Oppressors, and Usurpers of the Rights of the 'true, and direct Heir of *England*, and *France*; and we 'intend to prove it this Day by the Force of our Arms, 'Almighty God affording us his Assistance.

To these Articles *John Harding* immediately sub-joins the following Lines.

For-

'FORASMUCH as many Men have been inerred, and yet 'stonde in grete Erroure and Contraversy; holding Opi-'nion froward, how that *Edmonde* Erle of *Lancastre*, *Lei-'cestre*, and *Derby*, was the elder Son of Kyng *Henry* III. 'croukebacked, unable to have been Kyng, for the 'which, *Edward* his younger Brother was made Kyng 'by his Assent, as some Men have alleged, by an un-'trew Chronicle feyned in the Time of Kyng *Richard* II. 'by *John* of *Gaunt* Duke of *Lancastre*, to make *Henry* his 'Son Kyng, when he saw he might not be chose for 'Heire appariant to Kyng *Richard*.

'SO it is, that I *John Harding*, the Maker of this 'Booke, herde the Erle of *Northumberland*, that was slain 'at *Bramham-Moor*, in the Time of Kyng *Henry* IV, 'saie, how the same Kyng *Henry*, upon St. *Mathew* Daie, 'afore he was made *Kyng*, put forth that same Chroni-'cle, claiming his Title to the Crown by the seid *Ed-'monde*, upon which all the Chronicles of *Westmynstre*, 'and of all other notable Monasteries, were had in the 'Council of *Westminstre*, and examined among the Lords, 'and proved well by all their Chronicles, that the Kyng '*Edward* was the elder Brother, and the seid *Edmonde* the 'younger Brother, and not Croukebacked, nother maym-'ed, but the seemliest Person of *England*, except his 'Brother *Edward*. Wherefore that Chronicle, which 'Kyng *Henry* so put forth, was adnulled and reproved.

See also John Hardyng's *printed Chronicle*, c. 157.

'AND then I herde the seid Erle saie, that the seid 'Kyng *Henry* made Kyng *Richard*, under Duresse of Prison, 'in the Toure of *London*, in fere of his Life, to make a Re-'signation of his Right to him; and upon that a Renun-'ciation of his seid Right; and they were declared in the 'Counsell: And in the Parliament at *Westmynstre*, on the 'Morrow of St. *Michael* then next following, what of his 'Might and his Wilfulnesse, and what by certain Lords and 'Strength of the Commons, he was crowned against his 'Oath made in the *White Freers* at *Doncastre*, to the seid 'Erle of *Northumberland*, and other Lords, against the 'Will and Counsell of the seid Erle, and of his Son, 'and of Sir *Thomas Percy* Erle of *Worcester*. For which 'Cause they died after, as I knew well; for that time 'I was in the Field at *Shrewsbury* with Sir *Henry Percy*, of 'the Age of Twenty Five Yere, armed, and afore 'brought up in his House, of Twelve Yere Age.

'ALSO I herde the ſeid Erle of *Northumberland* ſaie 'divers times, that he herde Duke *John* of *Lancaſtre*, a-'mong the Lords in Counſell, and in Parliaments, and 'in the Common-Houſe among the Knights choſyn for 'the Commons, aske by Bill, for to have been admytted 'Heire apparaunte to Kyng *Richard*, conſideryng how 'the Kyng was like to have no Iſſue of his Body. To 'the which the Lords Spirituell and Temporell, and the 'Commons in the Common-Houſe, by whole Advyſe 'ſeide, that the Erle of *Marche*, *Roger Mortimere*, was 'his next Heire to the Crown, of full Deſcent of Blood, 'and they wolde have none other; and asked a Que-'ſtion upon it, who durſt diſable the Kyng of Iſſue, he 'being young, and able to have Children? For which, 'when the Duke of *Lancaſtre* was ſo put by, he and 'his Counſell feyned, and forged the ſeyde Chronycle, 'that *Edmonde* ſhould be the elder Brother, to make his 'Son *Henry* a Title to the Crowne; and wold have had 'the ſeide Erle of *Northumberland*, and Sir *Thomas Percy* 'his Brother of Counſaile thereof, for cauſe they were 'deſcendyd of the ſeid *Edmonde* by a Siſter; but they 'refuſed it.

'WHICH Chronycle ſo forged, the Duke did put in 'divers Abbaies, and in Freers, as I herde the ſeid 'Erle ofttimes ſaie, and record to divers Perſons, for 'to be kept for the Inheritance of his Son to the 'Crowne; which Title he put furthe after he had Kynge '*Richard* in the Toure; but that Title the Erle *Percy* put 'aſide."

UPON the Peruſal of the foregoing Tranſcript, I perſuade myſelf, the Reader will be thoroughly convinced, *Firſt*, That the Doctor is much miſtaken, when he tells us, that the Family of the *Percys* did not take up Arms for the Sake of the Right Heir; ſince the above-written Articles abundantly ſhew, that they had the Intereſt of the (*u*) Earl of *March* entirely at Heart; and were chiefly animated to that hazardous Enterprize by a

(*u*) *This is likewiſe evident from the Rolls of Parliament, where it is ſaid, the Earl of* Northumberland *declared to the Ambaſſadors of the* French *King*, Que a l'aide de Dieu, de le votre, & de pluſours mes Allies, j'ay intention & ferme purpos de ſuſtenir le droit querele de mon Souvereine Seigneur le Roy *Richard*, s'il eſt Vif; & ſi mort eſt, de vanger ſa mort, & auſſi de ſuſtenir la droite querelle, &c. *Here the Copy of the Record, I made uſe of, breaks off; but it cannot be doubted, but the Earl of* March *was meant.* Plac. Coron. 7 Hen. 4. N. 9.

Senſe

Sense of the Injury done to him, and a full Conviction, that it became them to venture every thing, in order to procure him Justice. *Secondly*, It is from hence evident, that they charge *Henry* IV. with a Breach of his solemn Oath to them, by which he had obliged himself never to attempt any thing against the Right, Honour, or Safety of King *Richard*; upon Confidence of his due Performance of which Oath, they came to his Assistance. So that here is an *Original Contract* pleaded, by the Violation of which, on the King's part, the Earl of *Northumberland* and his Family thought themselves entirely released from all manner of Obligations to him. They declare, it was never their Intention to deprive *Richard* II. of his Crown; but that on the contrary, it was their constant Resolution, to maintain him in the Throne, and after his Decease to assert the Title of the True Heir: That *Henry* therefore was guilty of Perjury by usurping the Crown, and therefore forfeited all manner of Right to their Service. Out of a Sense of this their Duty to King *Richard*, and the Earl of *March*, they opposed, as far as they were then able, the Duke of *Lancastre's* Coronation; but (*x*) finding themselves incapable of making any effectual Resistance, it must be acknowledg'd, they submitted with the rest, and liv'd some Years in Obedience to him, as their King; and if the Doctor will have it so, swore to him too. But if this was an unjust Oath; if they themselves thought it so, when they took it, (as is evident from the Articles before-mentioned) will the Doctor blame them for not keeping it? He will say perhaps, they were inexcusable then in taking it; if they knew it to be an unrighteous Oath: I cannot help that; neither will it be worth the Doctor's while to insist upon it; since the main Point in Controversy now between us is, Whether they may be justified for taking up Arms against *Henry* IV?

(*x*) John Harding's *Chron.* c. 196. *The* Percys *had disbanded their Forces, supposing the Duke of* Lancastre *would keep his Word.*

HOWEVER, that I may omit nothing, which may be serviceable for the Defence of that noble Family; I desire Leave to put him in mind of a certain Principle, generally received in the Times we are speaking of, and which for some while before had a very prevailing Influence over the great Men of this Kingdom, whenever they found themselves in Danger; and that was, that all Actions done through Fear of Death, were pardonable

at

at least, if not lawful. And it cannot be denied, but our Courts of Justice had been so favourable to Pleas of that Nature, before *Henry* IV.'s Reign, that great Encouragement had been given for the frequent Use of them. After the Battle of *Evesham*, when that famous (*y*) Act was made for the Settlement of the Kingdom, called *Dictum de Kenilworth*; those that had been drawn in to assist the Barons against the King through Fear, had but a small Fine set upon them. And in (*z*) *Edward* III.'s Reign, when *Walter de Alington* and his Confederates had forced some Persons, and made them swear to defend the Prizes they had taken; the Court admitted these Persons to bail, and dismissed them soon after. But the most remarkable Instance to this Purpose happen'd in the Beginning of this very Reign, which is now under our Consideration; for when the Judges, who had given illegal Advice to *Richard* II, and thereby were the Occasion of some (*a*) Acts, that passed in the Twenty First Year of his Reign; when they, I say, were called to account for it in *Henry* IV.'s Parliament; they made use of this Excuse, That whatever they did, was for Fear of Death. Upon which the Commons presented this memorable Petition: (*b*)

Item, 'Your Commons pray, that neither the Lords 'Spiritual or Temporal, nor the Justices, may be al'low'd for the future to excuse themselves, by saying, 'they did not dare to act or speak according to Law, and 'as their true Meaning was, for Fear of Death, or be'cause they were not free of themselves; for they are 'obliged to keep their Oaths, notwithstanding any Dan'ger of Death or Forfeiture.

From whence I think it is plain, that this had been the common Argument made use of by the great Men, in Defence of their Illegal and Disloyal Practices; and

(*y*) 49 Hen. 3.

(*z*) 21 Edw. 3. Coram Rege Rot. 101. Linc.

(*a*) Coke's *Instit.* l. 3. c. 2.

(*b*) Rot. Parl. 1. Hen. 4. 97. Item, Que les Seigneurs Espirituells & Temporells, ne les Justices ne soient resceux en temps advenir pur leur excuser a dire, qu'ils n'oserent faire ne dire le ley, ne leur entent, pur doute de Mort, ou qu'ils ne sont libres de eux mesmes. Pur ceo qu'ils sont pluis tenuz de reson de garder leur ferments, que de douter Mort ou ascun forfaiture.

The King answers. Le Roy tient toutz les Seigneurs & Justices pur hommes sufficients & loyaulx, qu'ils ne luy veillent donner autre Conseil n'advis, qui ne soit honeste, & jouste, & profitable pur luy & le Royalme; & si nully se voet compleindre en especiall en temps advenir del contrary, le Roy le ferra reformer & amender.

Custom had so far prevail'd, that hitherto it had the good Fortune to be thought just and reasonable; I may say too, that it continued in the same Credit in the following Reigns, notwithstanding this Petition of the Commons: For as *Henry* IV, in his Answer to it, says nothing, which implies a Disapprobation of that customary Excuse; so we find, that in *Henry* V.'s Time, those that had assisted Sir *John Oldcastle* (*c*) only out of Fear of Death, were discharged: And lastly, by this Plea, *John Nevill*, Marquis of *Montacute*, procured his Pardon from *Henry* VI. at his Restoration, for being in the Service of *Edward* IV; for it is said, (*d*) he came to his Parliament excusing himself, that for Fear of Death he had taken King *Edward*'s Part; which Excuse was accepted. Agreeably therefore with the allowed and approved Maxims of those Times, the Submission and Oath of the *Percys* to *Henry* IV. has a fair Pretence to a favourable Construction; since it was done purely to save their Lives and Fortunes, which otherwise must have been in imminent Danger. And this I would not be thought to mention, out of any great Reverence or Esteem I have for such an Apology; but only to shew, that those Gentlemen did not act dishonourably, according to the Sentiments of the Times they liv'd in, when they took an Oath to *Henry* IV, which at that very Instant, they believed they ought not to keep. This was the common Error of that Age, into which, we have observed, the very Sages of the Law themselves had fallen; and therefore it is not to be wonder'd at, if Noblemen (who rarely meet with Casuists, that advise them against their Interest) have not more Wisdom or Honesty, than they that make those Vertues more particularly their Profession. Had they liv'd in these Days of Light and Knowledge, I confess, I should have found it difficult, to say any thing in their Defence; for the Doctrines of Christianity are now so well understood, that whoever should venture to maintain the Lawfulness of doing Evil for the Advancement of any Temporal End or Purpose, would draw upon himself at least the Displeasure of all good Men, and hardly escape a publick Censure.

(*c*) Coke's *Inst.* 3. *c.* 1.

(*d*) Holinshead's *Chron.* p. 678.

After all, it may perhaps give Offence to the Doctor, that I have charged *Henry* IV. with a Breach of his *Original Contract*; and admitted that as a good Reason for

the *Percys* Taking up Arms against him: But surely, if there is any ground for the Notion of a Contract between a Prince and his Subjects; it must be, when an Elected King is on the Throne, who owes that high Dignity entirely to the Choice of the Nobility, and the Consent of the People; and (*e*) such a one, and no better, was this King *Henry*, whatever may be alledged to the contrary. He could not certainly pretend to a juster Title, than his Predecessor King *Stephen*; who yet consented to an Instrument of Government, in which he expresly calls himself an Elected King; and therefore the Historians tell us, that (*f*) *Robert* Earl of *Gloucester*, and the Bishops too, did Homage to him conditionally, that he would maintain them in their Rights and Privileges; and we know very well, that his Violation of them was pretended as a Reason for their Revolt from him afterwards.

SINCE therefore the Assistance given to *Henry* IV. by the *Percys* (by Virtue of which he was enabled to seize the Crown) was purely the Effect of that Confidence they reposed in his Promise and Oath, that he would never dethrone King *Richard*, nor put him to Death; I would submit it to the Doctor's Consideration, whether a Trust so notoriously broken and abused, did not authorize those Gentlemen to seek for Justice by Arms and Violence against him. That *Henry* IV. heaped great Honours upon the Earl of *Northumberland*, giving him the *Isle of Man*, and constituting him Constable of *England*, I very readily own; and this he certainly did, that he might the better secure that Great Family to his Interest: But then I think this is a Proof, that they were not influenced by any Motives of Advantage to themselves by their subsequent Revolt, (as the Doctor calls it) for how prosperous soever the Event had been, they could not well have promised themselves greater Accessions to their (*g*) Honours and Fortunes, than they either actually enjoyed, or might reasonably have hoped for from the Bounty and Favour of King *Henry*.

THUS far I will presume to say, I have clearly proved, that the Insurrections against *Henry* IV. were occasioned

(*e*) J. Harding's *Chron.* c. 196.

(*f*) W. Malmsbury.

(*g*) *Besides the Honours before-mentioned, all the Lands of the* Douglasses *in* Scotland *were granted to the Earl of* Northumberland. Rymer's Fœdera, Tom. 8. p. 289. *And many other great Estates, Sir* W. Dugdale's *Baronage in* Percy *Earl of* Northumberland.

casioned by a Profession of Fidelity to the Rightful Title; to *Richard* II. whilst alive, and the Earl of *March* after that King's Decease; and therefore the Authors and Promoters of them are much wrong'd by the Doctor, when he says, they acted upon quite different Motives.

THE next Commotions that happen'd in this Reign, were those of Archbishop *Scroop*, and the Earl of *Northumberland*; and that these were raised upon the same Grounds, their publick Declarations sufficiently testify. The Archbishop's Articles are *(h)* extant; in the Preamble of which he says, in his own Name, and that of all his Adherents, *That having been bound by their Oaths to King* Richard II. *to bear Faith and true Allegiance to him, as long as he lived, and his Heirs succeeding him by just Title*, &c. They therefore, for fear of Perjury, perceiving divers horrible Crimes and great Enormities to be daily committed against the Church, the Laws of the Realm, as also against the Person of King *Richard*, and his Heirs; do, *First*, declare the Lord *Henry* of *Derby* to be a Traitor to King *Richard* and his Heirs. *Secondly*, They pronounce him Perjur'd and Excommunicate, for taking Arms against King *Richard*, and afterwards murdering him. In the *Tenth* Article they affirm, that they take up Arms for the sake of the Right Heir. Besides *J. Harding* tells us, That the Lord *Percy*'s Articles before recited, were drawn up by this Archbishop; and another *(i)* Author, that liv'd at the same Time, assures us, That the Reasons, for which that Archbishop was beheaded, were, *First*, Because he advised *Henry* IV. to repent of his Perjury in swearing by the Sacrament of CHRIST's Body, that he would not rebell against *Richard* II. nor consent to his Deposition; which afterwards he did. And, *Secondly*, The said Archbishop desired the Crown might be restored to the Right Line. Is it not then evident, beyond all Contradiction, that this Archbishop took up Arms for the Right Heir; and by his publick Declarations own'd to the World, that he thought himself bound in Honour and Conscience so to do? And may we not then have liberty to believe,

(*h*) *In* Fox's *Acts and Monuments*, p. 591. *and Mr.* Wharton's Anglia Sacra, *Vol.* 2. *p.* 368.

(*i*) Clement Maydstone de Martyrio Archiepiscopi Scrope, *in Mr.* Wharton's Anglia Sacra, *Vol.* 2.

that

that He and the *Percys* were true (*k*) Penitents, for having contributed to the Settlement of *Henry* IV. upon the Throne? The Doctor indeed seems to laugh at this Conceit of their Repentance, as a groundless Fancy; and is (*l*) confident, that Men that acted upon such Motives, as the Earl of *Northumberland*, his Son *Hotspur*, and his Brother the Earl of *Worcester*, ought not to be esteemed Penitents: But I have proved, that the Doctor has shew'd himself a perfect Stranger to this Part of History; otherwise he must have known, that the true Cause of their Quarrel against *Henry* IV. was, that he was an *Usurper*; and they believed it to be their Duty, to place the *Rightful Heir* on the Throne.

It is a great Comfort to him however, that all these Lords and Gentlemen, who took up Arms against *Henry* IV. had before submitted to him, and sworn Allegiance; for he is only concerned to know, whether it has not been always the Custom, to swear to Kings *de Facto:* But if it has been the Custom to take such Oaths, he should remember, that it has been also the Custom to break them; which the Doctor knows to have happened in the Reigns of King *Stephen*, and *Henry* IV. the two most undoubted Kings *de Facto* from the *Norman* Conquest; and thus we are reduced at length to this Question, Whether the Doctor, or the chief Leaders in all the Insurrections against *Henry* IV. are rather to be credited? If we must believe the Doctor, their Revolt was inexcusable, founded upon no rational Principles, and indeed was no better than downright Perjury and Rebellion: But if we may take the Word, the dying Word of those Gentlemen; they were persuaded, that the Oath they had taken to *Henry* IV. did not bind them; and that they were obliged in Conscience to force him from the Throne, for the sake of the Right Heir.

(*k*) Holinshead, *in his Chron.* p. 529. *gives* Richard Scroop, *Archbishop of* York, *the following Character. The Respect Men had to him, caused them to like better of his Cause; since the Gravity of his Age, his Integrity of Life, and incomparable Learning, with the reverend Aspect of his amiable Personage, moved all Men to have him in no small Estimation. Upon which account his Memory was held in such Esteem, that he was considered as a* Saint *and* Martyr *by the People, who frequented the Place of his Burial with great Devotion, till they were restrained by Publick Authority,* (Holinshead, *p.* 530.) *And therefore* Henry V. *upon his Accession to the Crown, thought it a popular thing, to give Leave to the People to pay their accustomed Honours to this Archbishop's Memory, as* J. Harding *assures us,* Chron. 211. *He gave Leave then of good Devotion all Men to offer to Bishop* Scrope *expresse, without Letting, or any Question.*

(*l*) *Defence,* p. 46.

Now

Now the Doctor may call these unrighteous, and unjust Pretences, as long as he pleases; provided he will but allow, that it is true in Fact, that they made use of such, and no other; which I am confident he will never be able to disprove. And then I think I may appeal to the most byas'd Friend to the Doctor's Cause, Whether so many Gentlemen of the first Quality and Fortune in *England*, could openly and avowedly have ventured their Lives for a Person out of Possession; had it been then a known and undoubted Part of the Constitution, that whoever was in Possession of the Crown, was a Rightful and Lawful King. Had this been the received Doctrine of those Times, it is wonderful strange, we should meet with no manner of Notice of it in any of our Histories; it seems incredible, that so many Persons of Eminency should presume to act in open Contempt of it, to the manifest Subversion of a Fundamental Law of their Country; and yet without the least Reproach from their Enemies upon that account.

But I should remember, that these so often repeated Reflexions must needs be tiresome; and therefore it is fit I should hasten to another Subject. I would now only beg Leave of my Reader, to set before him a short View of the Comforts and Blessings, which attended the Doctor's *Constitution*, in this Reign of a King *de Facto*. *Henry* IV. had no sooner taken Possession of the Kingdom, but he was in Danger of losing it by a formidable Conspiracy, fram'd against him in the Heart of his Kingdom: It is true, he had the good Fortune speedily to suppress it, and make an Example of its Authors and Contrivers: But fresh Troubles and Rebellions (as the Doctor calls them) still followed one another for many Years of his Reign; and that evil Spirit of Resistance continued to animate the *Welsh* against him, to the last Period of his Life. Mr. *Fox* (*m*) tells us, *The Time of his Reign was far from being quiet, but full of Trouble, of Blood, and Misery.*

(*m*) *Acts and Mon.* Vol. I. p. 590.

Such was their Desire of King *Richard* again, in the Reign of this King, that many Years after, he was rumour'd to be alive; for the which divers were executed. For the Space of Six or Seven Years together, almost no Year passed, without some Conspiracy against

(n) *Chron.* p. 541.

the King, &c. And (n) *Holinshead* confesses, he resign'd in great Perplexity, and little Pleasure. These certainly are admirable Proofs of the great Submission and Obedience, which was then paid to the Doctor's *Constitution*; and no doubt, the Tranquillity of this King's Reign will never be denied for the future, to be a lively Instance of the Authority of a King *de Facto*.

I SHALL now conclude these Remarks upon *Henry* IV.'s Reign, with the following Reflexion of that very judicious Gentleman Sir *Walter Raleigh*. (o)

(o) *In his Preface before his History of the World.*

HENRY IV, *whose Title was weak, and his obtaining the Crown traiterous; who brake Faith with the Lords at his Landing, protesting to intend only the Recovery of his proper Inheritance; brake Faith with* Richard *himself; and brake Faith with all the Kingdom in Parliament; to whom he swore, that the Deposed King should live: After he had enjoyed this Realm some few Years; and in that Time had been set upon on all Sides by his Subjects, and never free from Conspiracies and Rebellions; he saw (if Souls immortal see, and discern any Things after the Body's Death) his Grandchild* Hen. VI, *and his Son the Prince, suddenly, and without any Mercy, murder'd: The Possession of the Crown (for which he had caused so much Blood to be poured out) transferr'd from his Race, and by the Issues of his Enemies worn and enjoy'd: Enemies, whom by his own Practice he supposed, that he had left no less powerless, than the Succession of the Kingdom questionless, by entailing the same on his own Issues by Parliament. And out of Doubt, Humane Reason could have judged no otherwise, but that these cautious Provisions of the Father, seconded by the Valour and signal Victories of his Son* Henry V, *had buried the Hopes of every Competitor, under the Despair of all Re-conquest and Recovery. I say, that Humane Reason might so have judged, were not this Passage of* Casaubon *also true; A Day, an Hour, a Moment is enough to overturn the Things, that seem to have been founded and rooted in Adamant.*

I PROCEED now to *Henry* V.'s Reign, to whom, the Doctor is positive, the whole Kingdom, without Exception, submitted: *The* (p) *Earl of* March *himself quietly resigning up his Right to the Crown, without making the least Attempt for the Recovery of it.* But the Doctor should have known, that the *Welsh* were not brought under this King's Obedience in the Third Year of his Reign; whose original

(p) *Defence,* p. 47,48,91.

nal Quarrel against him was upon the account of his Title, as I have shewn at large. And we are sure likewise, from (*q*) unquestionable Authority, that the Earl of *March* was engaged in a Conspiracy in this Reign, in order to Depose King *Henry*, and set the Crown upon his own Head: That for this Purpose he had agreed with his Brother-in-Law the Earl of *Cambridge*, to go with him into *Wales*; where they intended *to proclaim* Harry *of* Lancastre *Usurper of* England. And the Earl of *Cambridge* declares, that the Earl of *March* had told him, *that all his Confessors put him in Penance to claim that, they called his Right.* Besides, we find this said Earl (*r*) pardoned by *Henry* V, for the Share he had in this Conspiracy; which undeniably proves, the Doctor has strain'd a Point in History, when he would persuade us, that Earl never laid any Claim to the Crown. Afterwards, 'tis true, he gave *Henry* V. all imaginable Assurances of his entire Submission; upon which he was immediately employed by that Prince in the highest Offices of Trust and Honour; and those he discharged with great Fidelity, to the Time of his Death; which happen'd in the Third Year of *Henry* VI. During that Space of Time, I mean the Remainder of the Earl of *March*'s Life; after he had made this Submission, I agree with the Doctor, *Henry* V.'s Title had some Foundation: For to whomsoever the Rightful Heir shall think fit to swear Allegiance, and perform the Services of a dutiful Subject, I shall make no Question, but every private and inferiour Person may very lawfully do the same. And this I take likewise to have been the Case of the People of *England*, for almost the whole Reign of *Henry* VI. For the Duke of *York* (who had the best Pretension by Blood to the Crown) having bound himself by repeated Oaths and Obligations, to pay Obedience to him, as his Lawful Prince; Who could reasonably be a *Nonjuror*, after such an Example? In this respect therefore the Doctor must do me the Justice to acknowledge, I yield him up a Point, which he seems to have very much at Heart. I allow it to be true, that *Richard* Duke of *York*, and his Son (afterward King *Edward* IV.) were under the strictest Ties and Engagements of Fidelity to *Henry* VI; these are Matters of Fact too evident to be contested; and I am entirely satisfied, they may be

(*q*) *See the Earl of* Cambridge's *Confession*, apud Rymer. Fœdera, &c. Tom. 9. p. 300, 301.

(*r*) Rymer. Fœdera, Tom. 9. p. 303.

be proved (*s*) beyond all Possibility of Contradiction. But then the Doctor must confess, that *Henry* V. and VI. were Kings *de Jure*, as well as *de Facto*; *i. e.* they had a Right to the Subject's Allegiance by a different Title, than that of Possession; and consequently they are not Kings for the Doctor's Purpose; for the Question is not, whether Princes do not become Lawful by the Cession of the Legal Heir; this is granted, and allowed by his Adversaries; but whether the bare Possession of the Crown, exclusively of all other Considerations, can convey a Right to Allegiance? Thus we see the Doctor has given up Two of his Kings *de Facto*, which at other Times he seems to be very fond of, as main Supporters of his Imaginary Constitution.

(*s*) *The several Renunciations of* Richard *Duke of* York *and his Son, being particularly and fully urged by Sir* John Fortescue *in his MS. Defence of the House of* Lancastre (Bibl. Cotton. Otho B. 1.) *it may not be amiss to give the Reader a full View of them in the* Appendix, N. 1.

But whatever the Doctor may lose in this Point, he doubts not to gain in another; for from hence he thinks it plain and undeniable, that *Edward* IV. and his Parliament were to blame in calling *Henry* V, and VI. *Kings indeed, and not of Right*; as if this was the first time this Distinction had been ever used, and it had never before been thought of: Whereas the Judgment given by the House of Peers in the * Appeal of *Richard* Duke of *York*, was manifestly grounded upon it: For certainly they would never declare the Right of the latter to be indefeasible, had they believed *Henry* VI. to be King *de Jure*. But how could they think it reasonable, the Doctor will say, to give such a Sentence; considering the House of *York* had freely parted with their Right, by several solemn Oaths and Engagements? Could they not renounce their Pretensions to the Crown, if they had pleased? and was not this effectually done by their swearing Allegiance so often to *Henry* VI? I answer; The House of Peers, to whose Arbitration this Matter was referred, was of another Mind; for after a full Hearing of all the Objections, that could be made against the Duke of *York*'s Title, (among which his repeated Oaths of Homage and Fealty had been carefully and warmly urged) it was (*t*) concluded and agreed by all the Lords, *That the Title of the said Duke of* York *could not be defeated.* It is evident therefore, in the Opinion of that supreme Court of Judicature, That the Duke of *York* was still at liberty (notwithstanding the Oaths he had taken) to lay Claim to the Crown; and they thought themselves bound

* *See the whole Proceedings transcrib'd from the Parliament Rolls,* App. N. 2.

(*t*) Rot. Parl. 39. Hen. 6. *sect.* 18.

in

in Justice to adjudge it to him. During the Time that the Duke of *York*, who had the Hereditary Right, kept his Oath, and paid Allegiance himself to King *Henry*, I see no Reason, why the Subjects of that Time might not Lawfully swear and perform Allegiance also: But when the said Duke claim'd the Crown as his Right of Inheritance; then it began to be a Question, Whether the Subjects were bound to pay Allegiance to the Lawful Heir, or to the King in Possession, to whom they had hitherto paid it. The first Article objected against the Doctor's Claim was, That the Lords should call to remembrance the Oaths they had made to King *Henry*; to which the Sum of the Duke's Answer was, *That no Oath ought to be performed, when it leadeth to the Suppression of Truth and Justice*; and he undertook to shew clearly, before any Judge spiritual, (*u*) *That the Lords were bound to assist him in Truth and Justice, notwithstanding any Oath of* Feaute *or other by him or them before made.*

(*u*) Rot. Parl. 39 Hen. 6. n. 14.

The Oaths of the Lords made to King *Henry* might be excusable, by their Ignorance of the Facts necessary to clear the Right of the Lawful Heir; by his not Claiming; and by his swearing Fealty to the King in Possession: But when the Claim was made publickly, and the Duke's Right to the Crown was evidently prov'd before the Lords; then it was plain, that their Oaths to King *Henry* being against evident Right, could not have any Obligation; for it was a known Rule in the spiritual Law, That (*x*) an Oath was not instituted to be a Bond of Iniquity: And in that very Age these Rules were inserted in the *Decretals*, (*y*) That an Oath, taken in prejudice of a superiour Right, was not valid; and that an Oath due to one, but made to another, was unlawful; and was to be performed to him, to whom it was due. Thus by the Canon Law the Oaths of the Lords were obligatory.

(*x*) Decr. 2 Causa, 22 Qu. 4. c. 22.

(*y*) Decretal. Greg. 9. lib. 2. tit. 24. c. 19, 22.

And as to the Duke's Oath of Fealty to King *Henry*, according to the same Canon Law, then universally Receiv'd, and the common Opinion of Divines, He might be releas'd from it, if it was taken by him to preserve his Estate, Liberty, and Life. 'Tis in vain to make a Dispute about Force, or Duress. 'Tis Notorious from the State of that Time, that if the Duke had claim'd the

Crown, or borne the Royal Arms, or refus'd to ſwear Fealty to King *Henry*, he had expos'd himſelf and Family to inevitable Deſtruction: To that Objection he anſwereth thus himſelf, before the Lords; (z) *That he abſtained for the Time from purſuing of his Right and Title, for Cauſes not unknown to all this Realm:* The Danger of doing it was Notorious to all Men. Wherefore (*a*) as his Silence was no Ceſſion of his Right; becauſe there was a ſufficient Cauſe of Silence: So his Oath of Fealty was no indiſpenſable Renunciation of it, according to the (*b*) received Law and Doctrine of thoſe Times; becauſe it was extorted by unjuſt Terror, and made by him *pro vitâ & rebus ſervandis.* King *Henry* could acquire no Right by exacting it; becauſe his Requiring of it was Injuſtice, and Uſurpation: And as to the Duke, tho' he ought not to have taken it, to gain or ſave the World; yet when it was taken, the ſpiritual Law reliev'd him: And the Pope actually granted him a Diſpenſation, which was then thought a ſufficient Abſolution. I am far from allowing the Pope any Power of diſpenſing with Oaths, or juſtifying the eaſy Relaxation of them by corrupt Caſuiſtry: But if we will judge of the Actions of Princes in Ages paſt, and examine the Validity of them, we muſt conſider the Laws, Uſages, and Doctrines then Receiv'd, and judge accordingly. Mankind in all Ages hath had an Horror of Violence, and Uſurpation, as deſtructive of Society; and hath agreed to render the Effects of them null, and invalid. Not Princes only, but all other ſorts of Men, have always thought themſelves free from the Obligations of Promiſes and Oaths, attended with enormous Leſion, and extorted by Fear of loſing Eſtate, Liberty, and Life; and (*c*) great Writers upon the Law of Nature do plainly affirm the Nullity of ſuch Oaths. In ſhort, if the Duke of *York*'s Oath had then

(z) Rot. Parl. ibid. n. 16.

(*a*) Grotius de jure B. l. 2. c. 4. ſect. 6. Qui ſciens & præſens tacet, videtur conſentire, niſi circumſtantiæ oſtendant, quò minùs loquatur, metu eum impediri.

(*b*) Dec. Greg. 9. l. 2. tit. 24. c. 15. Verùm in eâ Quæſtione, an à Sacramenti vinculo abſolvantur, qui iſtud inviti pro vitâ & rebus ſervandis fecerunt; nihil aliud arbitramur, quàm quod Anteceſſores noſtri Rom. Pont. arbitrati fuiſſe noſcuntur, qui tales à juramenti nexibus abſolverunt. Cæterùm ut agatur conſultiùs, & auferatur Materia dejerandi, non eis ita expreſsè dicatur, ut juramenta non ſervent: ſed ſi non ea attenderint, non ob hoc ſunt tanquam pro mortali crimine puniendi. Vide Thom. Aq. 2. 2ᵃᵉ Qu. 98. 3. 1ᵐ.

(*c*) Puffend. de jur. nat. lib. 4. c. 2. ſ. 8.

been

been try'd in any spiritual Court, as he desir'd it might be; he would no doubt have been acquitted of it. The high Court of Lords Spiritual and Temporal, his and their own Oaths notwithstanding, adjudg'd that his Title could not be defeated; and this was the general Opinion of the Nation in those Times, that the House of *York* had an indubitable Right; and the much greater Part of the Nation was for it, (as all our Historians agree) their Oaths to the House of *Lancaster* notwithstanding.

If after all, the Doctor will persist to affirm, that *Richard* Duke of *York* and his Son were indispensably obliged by their Oaths to *Henry* VI, and could not possibly be discharged from them by any Authority in the Kingdom, or out: This may be true, and yet the Award of the Peers be consistent with the Rules of Justice and Equity; for they do not pretend to determine, what was fit for those Princes to do in Conscience; but what they were bound to by the Laws of their Country, of which they were the proper Judges; and therefore whoever arraigns their Proceedings in this respect, does in Effect set up his own Private Judgment, against the Publick Sense of the Nation; (*d*) *which in Modesty should be allowed to understand, what the Constitution was in their own Times, better than we can at this Distance; and in Charity we ought to believe, that they acted agreeably to it.* This I take to be the true State of the Case. The Duke might have still continued a Subject, had he thought fit; and would his Ambition have suffer'd him to be so contented in that Condition: But how could the Peers help it, if the Duke of *York* would not be satisfied without his Right? All that became them, was to consider impartially the Matter referred to them: And since at length they came to this Resolution, that he was still at Liberty to claim the Kingdom, and ought to be put in Possession of it; who will presume to say, it was Arbitrary and Illegal? If a private Subject swears to one, who has wrongfully disseized him of his Estate, that he will never attempt the Recovery of it; the Law will put him in Possession, if he applies to it, notwithstanding his Oath, which Religion perhaps would oblige him to perform. And thus it is in many other Cases. If a Man loses a Sum of Money at Play, beyond what the Act of Parliament allows; and obliges himself by Oath to pay it; this may be

(*d*) *View*, P. 7.

be a just Debt in Conscience; tho' the Law will not force him to discharge it. In which Instance the Law does not pretend to annull his Oath; but only withdraws its Assistance from the Party, to whom it was made, as unworthy of any Aid or Countenance. And if the Law takes so much Care of the Rights of Private Persons, that they have not Power to alienate their Properties, by any Oaths or Conveyances, contrary to customary Methods, and prescribed Forms; certainly we are bound to believe, that the Titles of Princes and Heirs to the Crown, are at least as strongly guarded against any Injuries, which may be done them, even with their own Consent. So that the Judgment of the House of Lords in this Case seems plainly to rest upon this Bottom; That the Oaths taken by *Richard* Duke of *York*, did not amount to a Resignation; neither could that be Legally and Validly performed, without a due Observation of the Form and Manner, requisite to be observed upon such an Occasion.

It may now perhaps be demanded, how it is then possible for a Right Heir to the Crown to resign his Title, if the Oaths and Submissions of *Richard* Duke of *York*, were not sufficient for that Purpose. I answer, That a Legal and Effectual Resignation can only be made before, and with the Concurrence of the Three Estates of the Realm; which evidently appears from the Proceedings in this very Case of *Richard* Duke of *York*. For tho' the Lords would not allow, what he had done, upon any Consideration to be of Force to invalidate his Title; they were very sensible it was then in his Power to do it effectually, in the Presence, and with the Approbation of both Houses of Parliament. And therefore, tho' they had declared his Title could not be defeated by any Objections hitherto urged against it; yet they (*e*) thought it advisable for the Peace of the Kingdom, that he should consent, that *Henry* VI. should remain in the Throne for his Life; which being agreed to, and publickly ratified in open Parliament: Then, and then only, could *Richard* Duke of *York* be said to have made a sufficient and complete Resignation. And lest it should be suspected I have here deliver'd a singular Opinion, destitute of all manner of Authority; I hope the following Passage out of my Lord Chief Justice *Hale*'s

(*e*) Rot. Parl. 39 H. VI. N. 18.

Hale's MS. *History of the Pleas of the Crown*, will acquit me in this Point.

(f) *A King, that by Consent of Parliament takes another* in Consortium Imperii, *remains a King within the* 25*th of* Edward III. *We never had any Instance thereof in this Kingdom, but in that of* Henry II, *who took his Son into a kind of subordinate Regality; so that there was* Rex Pater, *and* Rex Filius. *But it is to be observed, that* Henry II. *did not divest himself of the Sovereignty, as some have thought; but reserv'd to himself the Liege, Homage, and Allegiance of his Subjects, yea and of his Son also: And although his Son were a King, yet he was a King but subordinate to his Father; and therefore, although he might be in some respects a King, in relation to the Subjects, that their Conspiring his Death might be Treason; yet he was but a Subject in respect to his Father; and his Attempt to eject his Father from his Kingdom, was Treason.*

(f) *Sir* Matthew Hale's Hist. Placit. Coronæ, MS. *Cap.* 9. *Vol.* 1.

But this Communication of Sovereignty by the King, could not be done without Consent of Parliament: For as a King cannot wholly resign, or dismiss himself of his Kingly Office, without Consent of Parliament; so neither could he, without such Consent, divide the Sovereignty. It was a wise Expression of Queen Elizabeth, *when she was urged to marry; she reply'd, She was married to her Kingdom; there is a sacred Bond between the King and his Kingdom, that cannot be dissolved without the free and mutual Consent of both in Parliament.*

In foreign Kingdoms there have been Instances of voluntary Cessions or Resignations, which possibly may be warranted by their several Constitutions; but by the Laws of England *the King cannot resign his Sovereignty, without his free Consent, and the Consent of Parliament. The Resignations that were made by* Edward II, *and* Richard II, *were extorted by Force, Violence, and Oppression, to give a Countenance to those Usurpations, that succeeded them; and were Acts of high Disloyalty and Injustice, and not to be mention'd without Detestation.*

It must be confessed, that my Lord Chief Justice speaks only of the Resignation of a King, not of the Right Heir, who is not in Possession; but surely the People of *England* have an Interest in the Right Heir, as well as in the King; and have been sworn to one, as well as the other; and therefore it behoves them to be

well assured, that Resignations made by such Heirs, are entirely free and voluntary; which cannot be done to general Satisfaction, but in open Parliament. Besides, if Oaths should be allowed as sufficient to convey a Right to whom they are taken; it could not be doubted, but Kings might part with their Crowns out of Parliament, as well as the Doctor believes the Duke of *York* did with his Hereditary Title. So that all things duly consider'd, I may venture to say, That no Kingdom of the World has declared itself more clearly and expressly in Favour of the Rightful Heir out of Possession, and consequently against the Authority of a King *de Facto*, than our own has done in the particular Case now before us: For here we find Judgment given against a Family, that had been in Possession of the Throne near Sixty Years; that had been frequently and solemnly owned and recognized by the Submissions and Oaths of all the great Nobility, and even of those very Persons, who laid Claim afterwards to the Crown: From whence the Inference is very plain and obvious; that by the Constitution of *England*, the Rightful Heir cannot destroy his Title by any Oaths of Homage or Allegiance; but he is still at Liberty to revive his Claim, when he thinks convenient; which can never be entirely extinguished, but by his free and express Renunciation in open Parliament. The (*g*) Doctor says indeed, that this was a partial Declaration of the House of Lords; King *Henry* being then a Prisoner, and the Duke of *York*, by a late Victory, absolute Master of the Parliament. But our present Dispute is about the Validity and Obligation of this Judgment; not the Means, by which it was obtain'd; which might be unrighteous and unjustifiable, and yet the Acts effected by them, of good Authority; for otherwise *Magna Charta* itself must be rejected, as Null and Void; since it was most certainly extorted by Arms and Violence. It is (*h*) enough to our Purpose, That this Judgment was given in a full House of Peers; That King *Henry*'s Friends were not only at Liberty, but were earnestly (*i*) desired by the Chancellor to object every thing, that might be proper for the Fortifying of his Title; That this Judgment was the Foundation of the Agreement between *Henry* VI, and *Richard* Duke of *York*, which was assented to by both Houses, and confirmed

(*g*) *View*, p. 54.

(*h*) Quam pluribus Prælatis & Proceribus præsentibus, Rot. Parl. 39 Hen. VI. N. 1.

(*i*) Ibid.

firmed by King *Henry* himself. And lastly, it ought to be considered, that this Judgment was never reversed or censured as Unjust or Illegal; but has always been esteemed as a Rule for future Proceedings, if the like Case should ever happen. Some of our (*k*) Chronicles, it is true, give us such a History of the Duke of *York*'s Behaviour in this Parliament, that one would really think, that King *Henry* was a Prisoner, during the whole Session; or never appeared, or had any thing to do in it; for they tell us, that the Duke of *York* placed himself in the Royal Throne, at the Opening of the Parliament; and made a long Speech to the Peers, with all the Air and Authority of a King; but surely the Records are more safely to be rely'd upon, which represent Matters quite otherwise. There we find, that the Parliament began their Session in King *Henry*'s Presence, who was seated in his Throne, in the Painted Chamber of his Palace at *Westminster*. And some Days after, the Claim of the Duke of *York* was presented to the Lord Chancellor, not by the Duke himself, (who is not mentioned, as appearing in the House, while the Debate continued) but by his Counsel; who also returned an Answer to the Arguments urged in Favour of *Henry*'s Title. So that those Stories of his Seating himself in the Throne, or Laying his Hand upon it, and then Claiming it Personally, are Fictions contrived purely for the Entertainment of those, that delight in secret History. All that I shall now add, is only this; That by Virtue of this Judgment, *Edward* Earl of *March* claimed the Crown, upon the Duke of *York*'s Decease; and soon after obtained Possession of it; and then his Father's Words were remarkably verified: (*l*) *That though Right for a Time may rest, and be put to silence; yet it rotteth not, nor shall not perish.*

(*k*) Hall's *Chron. and* Holinshead *from him.*

(*l*) Rot. Parl. 39 Hen. VI. N. 16.

I HAVE now finished my intended Examination of the Doctor's List of Kings *de Facto*, from the Conquest to *Richard* III; and I persuade myself, have made it at least doubtful, whether most of them had not a better Title, than he is willing we should believe: However, I think I have proved, that the Obedience, which was paid to them, could not be the Effect of the Doctor's Principles. Surely, if there ever was Occasion for them, it was in this Case of King *Henry* VI, when his Friends were

were earneſtly deſired by him, to think of every thing, that might be proper to defend his Right againſt the Claim of *Richard* Duke of *York:* But among the ſeveral Arguments urged for his Defence, (now extant upon Record) it is evident, the Doctor's weighty Reaſons were either never thought of, or elſe were over-ruled; which could never eaſily have happen'd, had they then been looked upon as any Part of our Conſtitution, or even as conſiſtent with it.

BEFORE I cloſe this Chapter, I muſt intreat the Reader to obſerve, that among the Reaſons aſſigned for paying Obedience to the *(m)* Doctor's Kings *de Facto*, I have not mentioned the Interpoſition of the *Pope*'s Authority; which, as mean as he is pleaſed to think it then was, never failed to be employed in all publick Controverſies in thoſe Times; and was not a little conſider'd. It were eaſy to prove this by many Inſtances; but at preſent I ſhall only deſire the Doctor to remember, that thoſe Princes, whom he has inſerted into his Liſt of Kings *de Facto*, took care in the firſt place, to fortify their Title by the *Pope*'s Conſent and Approbation; which could never have deſerv'd the Pains they uſually employed in procuring it; if it had not been of ſome Advantage to them, in the Opinion of their Subjects. *William the Conqueror* brought with him into *England* a Banner, that had receiv'd the *Pope*'s Bleſſing; and he as well as his Sons, who ſucceeded him, as reſolutely as they oppoſed the Papal Encroachments in ſeveral reſpects, were always deſirous to maintain a good Correſpondence with the Holy See. *(n)* King *Stephen* made it a Part of his Title, that he was confirmed by the *Pope* in his Kingdom; and I have already ſhewn, that the whole *(o)* Body of the Biſhops ſwore Fealty to *Stephen* a ſecond Time, in Obedience to the See of *Rome*; and not long after abſolutely refuſed to crown *Euſtachius*, *Stephen*'s Son, purely by Virtue of an Order they had receiv'd from the *Pope*. What Regard was paid to the *Pope*'s Authority in King *John*'s Reign, the *(p)* Doctor ſeems to be ſenſible: And

(*m*) *Defence*, p. 25, &c.

(*n*) Richardus Hagulſtadenſis (ad A. D. 1136.) *ſays, the Pope not doubting, but that King* Stephen *had promiſed Obedience to him at his Coronation, grants him a Bull, in which he confirms him in the Throne. Which Bull may there be ſeen, as alſo in* Rymer. Fœdera, Tom. I.

(*o*) *P.* 54.

(*p*) *Defence*, p. 26.

I beg

I beg leave to put him in mind, that the *French* Author, who wrote in Verse *An Account of the Troubles of* Richard II, of which he himself was a Witness, (*MS. Bibl. Harley*, 68. c. 23. *fol.*) says, *Archbishop* Arundell *procured a Bull from the* Pope, *which he openly read to the People, in which the* Pope *offered a Plenary Indulgence to all, that should assist the Duke of* Lancastre *against* Richard II. The Three *Henrys* of the House of *Lancastre* thought it no small Advantage to their Cause, that they had gain'd the *Popes* for their Friends. At last indeed his Holiness, by a strange piece of Ingratitude, is (*q*) said so far to have abandoned King *Henry* VI. as to have absolv'd *Richard* Duke of *York*, from all his Oaths to him; a Circumstance very worthy of the Doctor's Notice; because he expects from his Adversaries, that they should *prove, the Popes had ever put in Practice their pretended Power of absolving Subjects from their Allegiance*, (*r*). Lastly, the Devotion of *Henry* VII. to the See of *Rome*, and how much he depended upon the *Pope*'s Confirmation of his Title, are Matters of Fact sufficiently known. In the Beginning of his Reign a Bull is dispatched into (*s*) *England*, in order to secure him on the Throne; which he thought of such Consequence, that the Archbishop of *Canterbury* was obliged to send his Mandates to all the Bishops, to enter the Contents of it in their Registers, of which a Copy will be found in the (*t*) *Appendix*, taken out of the Register of Dr. *Stillington* Bishop of *Bath* and *Wells*. In the (*u*) 13th Year of his Reign this Bull was renewed; and a fresh Confirmation of his Title granted by Pope *Alexander* VI, under Pain of Excommunication to such, as should, upon any Pretence whatsoever, disturb the Peace of the Nation, and create Troubles to his Government. And therefore all our Historians have taken care to assure us, that *Henry* VII. put a great deal of Confidence in these Bulls. The Truth is, none of our Princes have been so kind to *Popes*, as those that have had the weakest Titles; because they found it their Interest to purchase the Favour and Protection of the *Papal See* by large and unreasonable Grants and Concessions. Thus

(*q*) Holinshead's *Chronicle*, p. 642, 650.
(*r*) *Defence*, p. 25.
(*s*) Rymer. Fœd. Tom. 12. p. 297.
(*t*) Appen. N. 3.
(*u*) Dr. Brady's *History of the Succession*, p. 391.

King *Stephen*, to gratify the *Pope* for his Indulgence in confirming his Title, suffers his Legate (*x*) to exercise a Degree of Authority in *England*, which was never before endured; and (*y*) our Author tells us, that *Appeals* to *Rome* first took their Rise from his Reign. *Henry* IV. being under the same Necessity of courting the *Pope*'s Assistance, to support him in his unjust Possession of the Throne; was not wanting in his Compliments to him: Therefore in the Beginning of his Reign he procured himself a Power (*z*) *to moderate or repeal the Statute of Provisors*; and the first Act of Parliament for *burning of Hereticks*, has been always thought to be the Effect of his Gratitude to the Holy See. Neither was *Henry* VII. less forward in dutiful Returns to his great Benefactor; for my Lord *Bacon* says, (*a*) *He ever applied himself with much Respect to the See of* Rome. And it must be confessed, upon all those Interruptions of the Succession, the Church of *Rome* so well found her Account, that she never failed to encourage them, as the propereſt Occasions of making her Encroachments on the Crown; and therefore in that respect, as well as in relation to the disadvantageous Bargains they were usually forced to make with Potent Peers, in order to engage them in their Interest; Mr. *Prynn* had reason to make this Reflexion; (*b*) *That Kings created, and set up meerly by Parliaments, and their own Power in them, without any True Hereditary Title, have seldom answered the Lords and Commons Expectations in the Preservation of their just Laws and Liberties, and Answers to their Petitions.* As a Proof of which, I shall only beg Leave to take Notice of one particular Instance, among the many of this Nature, which the Reigns of *Henry* IV, and VII. furnish us with. Those that are acquainted with the Histories of those Princes,

(*x*) *The Bishop of* Winchester, *as the Pope's Legate, had the Boldness to cite his Brother King* Stephen *before the Synod at* Winchester, *to answer for his Misbehaviour towards the Bishops*, W. Malmsburiensis, Hist. Nov. L. 2. Et vide W. Malmsbur. de Gest. Pontif. In Radulpho Archiepiscopo, p. 131. l. 1.

(*y*) Hen. Huntingdon, l. 8. p. 226. (16 Steph. R.) Totúmque illud Concilium novis Appellationibus infrenduit. In Angliâ namque Appellationes in usu non erant, donec eas Henricus Winton. dum Legatus esset, malo suo crudelitèr intrusit. In eodem namque Concilio ad Rom. Pontif. audientiam ter appellatus est.

(*z*) Cotton's *Abridg. of Rec.* 1 Hen. IV. 86, & 2. Hen. IV. 26.

(*a*) *Life of* Hen. VII. p. 70. Engl. *And see the Year Books*, 1 Hen. VII. 10 Term. Hil.

(*b*) *Mr.* Prynn's *Preface to Sir* Robert Cotton's *Abridgment of the Records*, Sect. 14.

know

know very well, that *Henry* IV. had never any occasion to try his Fortune in Battle against King *Richard* II.; and therefore could not with Justice pretend to owe his Crown to his Sword; but indeed to the general Disgust, which the Subjects of that unfortunate (*c*) Prince had taken against him, which naturally produced a *Desertion*. However, he had the Confidence in open Parliament to pretend a Right to the *Isle of Man* by *Conquest*; and by Virtue thereof he gave it to the Earl of *Northumberland*. *Whereas indeed the Conquest was no otherwise, than that Sir* William Scroop *was taken by him at* Bristow, *and beheaded by those, which were of the Part of this King, while he was Duke of* Lancastre, *and made his Way to the Crown. But it is not so much a Wonder, to see him give it as a Territory acquired by Conquest; if withal it be remember'd, that he had purposed to have challenged the Crowns of* England *and* Ireland *by a Title of the Sword, and not by Inheritance. But he was dissuaded from that Claim by Sir* William Thirning, *Chief Justice of the* Common Pleas; *and thence it was, that to give some Satisfaction to the Parliament, that doubted it, he made a publick Protestation*, that he would not that any Man should think, that by way of Conquest he would (*d*) disinherit any Man of his Heritage, Franchise, or other Rights, *&c.* I have represented this Matter in (*e*) Mr. *Selden*'s own Words, a Gentleman of unquestionable Authority; from whence it appear'd, how safe the Liberties of *England* were like to be in his Hands, after so early an Attempt against them. But *Henry* VII. had either more Resolution, or better Fortune; for tho' he ow'd his Success against King *Richard* to a Promise (*f*) he had made before he invaded the Kingdom, of marrying the Princess *Elizabeth*; yet he always made use of his Title by the Sword, and preferr'd it before all others: And the Truth is, it might be easily proved by some following Passages of his Reign, that he govern'd more like a Conqueror, than a Prince, that desired to be thought a Friend to the *Constitution*.

(*c*) Rot. Parl. 1 Hen. IV. Part 5. Memb. 36.

(*d*) Rot. Parl. 1 Hen. IV.

(*e*) *Titles of Honour*, c. 3. p. 25.

(*f*) Bacon's *Life of* Hen. VII. *pag.* 2. *Ed.* Eng. *Fol.*

The Doctor having endeavoured to shew, that the Subjects always believ'd their *Allegiance* to be due to every Prince upon the Throne, without regard to Birth, or any previous Title; in the next place he undertakes to prove, that Kings *de Jure* themselves have freely declared

clared themselves of the same Opinion. This, I confess, is home to his Purpose; but let us observe, from whence the Doctor draws this Discovery. (g) He says, the *Year-Books* clearly shew, *that upon the Death or Demise of any King of* England, (*by whose Authority, and in whose Name the Laws are administred*) *all Actions, Suits,* &c. *which were depending in any of the King's Courts, were discontinued, and the Parties put off; so that the Plaintiffs were compelled to begin their Actions again, or to sue a Re-summons to revive their Actions, until the 1st of* Edward VI. chap. 7. *provided a Remedy. Thus it was after the Death of* Edward IV. *in the Courts of* Edward V. *Thus in the Courts of* Edw. IV. *after the Dispossession of* Hen. VI; *and so it was likewise after the Death of* Richard III, *in the first Year of* Henry VII. From which Instances the Doctor observes, *that* Edward IV.'s, *and* Henry VII.'s *Judges allowing, that all the Actions and Suits depending in the Reigns of* Hen. VI, *and* Richard III, were discontinued by their Death or Demise, they likewise acknowledged thereby the Authority of those two Kings, *by which, and in whose Name the Laws had been administred in their respective Reigns.* And the Doctor has thought fit in his late (*h*) Defence, to insist again upon this Argument, as much to his Purpose.

But he must pardon me, if I think this a strange and very unaccountable Way of Reasoning. For how can it be any Proof of the Authority of a King *de Facto*, when alive; because it ceases, when he is dead? My Lord Chief Justice *Coke* (whom the Doctor will give me Leave to think as able a Lawyer, as himself) has (*i*) given a plain Reason, why *Discontinuance of Process and Law-Suits* was unavoidable in those Times, upon the *Death* or *Demise* of every King; and that is, because all their Commissions expire with themselves; and consequently the Courts of Judicature were destitute of Judges to preside

(g) *View*, p. 9.
(h) *P.* 52.
(i) Coke's *Reports, Part* 7, 30. Al common Ley per demise le Roy le Plea fuit discontinue, & le Proces, que fuit agard & nient returne devant le mort le Roy, fuit perde: Car per le Breve del Predecessour rien poit estre execute in le Temps del Novel Roy, si non que il soit in Special Cases; car par le mort le Roy non solement les Justices de l'un Banc & de l'autre, & Barons del Exchequer, mes les Viconts auxi & Eschetors, & touts Commissions de Oyer & Terminer, Gaole Delivery & Justices de Peace, sont determines par le mort le Predecessour, qui eux fit; & pur le remedie de ceo fuit le Statute de 1 Edw. VI. c. 7. mais encore cet Act n' adprovide remedie pur touts les Mischiefs, *&c.*

over

over them; and proper Officers were wanting, upon whom the Execution of all Writs and Orders depends: So that the Doctor's Argument is plainly this; *Henry* VI. had as little Power in some Cases, as his Predecessors; therefore he had as much as they, in all other respects: Or thus; *Henry* VI. could not raise Taxes without a Parliament, no more than King *Edward* III; therefore he was as Lawful a Prince as he. Surely one must have great Partiality for the Doctor, to approve of such Reasoning. Had the Case indeed been quite otherwise, upon *Henry* VI.'s Demise; had the Law-Courts been open, and Processes been continued; it might truly then have been affirmed, that his Commissions had a greater Force and Virtue, than any of those of his Predecessors; and this, I confess, might have been admitted as a Proof, that *Edward* IV. did really own his Authority: But as the Doctor has managed his Argument, it is evidently to the Disadvantage of his Cause; for were it true, that he is a Lawful King, upon whose Death or Demise all Processes are discontinued in the Courts of Justice; then it would be impossible there should be any Usurpers; then *Oliver Cromwell* would have had a good Title, according to the old *English Constitution*; and lastly, the Authority of the *Commonwealth* must also be allowed; for all Processes, *&c.* begun in their Courts, would have been discontinued at the Restoration of King *Charles* II, if an Act of Parliament had not passed on purpose to prevent it. In a word, the (*k*) Doctor inferrs from the *Discontinuance of Actions*, *Suits*, &c. in the Courts of Law, at the Demise of *Henry* VI, and the Dispossession of *Edward* IV; that these two Kings mutually acknowledged one another's Authority. Now the Reader must needs think this a very strange Piece of News; if he considers, that these Princes treated one another, upon all Occasions, with the opprobrious Names of *Usurpers* and *unjust Possessors* of the Throne: The Doctor knows this to be true of *Edward* IV, whose Acts are full of Reflexions on the Three *Henrys*, as Kings without any Right or Justice; and when *Henry* VI. recovered the Crown, he (*l*) speaks of *Edward* IV. in the same civil

(*k*) *View*, p. 9.

(*l*) Apud Rymer. Fœder. & Convent. &c. Tom. xi. p. 705, 706. Henry VI. *calls* Edward IV. Inimicum suum magnum & Rebellem, qui nuper Coronam & Dignitatem nostras falsò & proditoriè, ac usurpativè occupârat. Et vide p. 696, 680.

and obliging manner; for he ſays, that he *falſly*, *traiterouſly*, and *uſurpingly* poſſeſſed the Crown. Were they then but in jeſt, when they beſtowed this Language ſo freely upon one another? And has the Doctor at laſt diſcovered a ſecret League of Friendſhip between them? It will however be very obliging in him, to make it out a little better, than he has yet vouchſafed to do.

THE Doctor now proceeds to another Argument from the *Year-Books*. (*m*) *From them*, ſays he, *we may obſerve, that all the Grants, Licenſes, Letters Patent, Gifts, and in ſhort, all the Regal Acts of the Three* Henrys *of the Houſe of* Lancaſter, *and of* Richard III, *are pleaded and allowed in all the Judicial Proceedings of* Edward IV, *and* Henry VII.'*s Courts of Judicature, to be as valid, as if they had been the Grants*, &c. *of any of their Progenitors of the moſt unconteſted Titles.* Bagot's *Caſe is that, which has been uſually urged and debated in this Controverſy; and ſome may be apt to think, this is the only Inſtance, that is to be given; but in Truth the* Year-Books *furniſh us with abundance of the like Caſes.* Bagot's *Caſe alone was cited, I ſuppoſe, by my Lord Chief Juſtice* Coke; *not only becauſe he thought that Caſe was of itſelf deciſive; but becauſe it was the only Caſe in the* Year-Books, *where the Authority of a King* de Facto *had ever been diſputed, and yet Judgment given for it; and becauſe ſeveral Points of Law relating to that Authority were there maintain'd.*

(*m*) *View*, p. 13.

IN anſwer to all this, I might juſtly queſtion, whether in Fact it be true, that ſuch an *abundance of Inſtances can be produced of Grants, Licenſes*, &c. *of the Three* Henrys, *which were pleaded and allowed in the Courts of* Edward IV. For after a careful Peruſal of the *Year-Books* of that Reign, I muſt freely own, that if any ſuch are to be met with, they have eſcaped my Obſervation, tho' I uſed as much Diligence in order to the Diſcovery, as I thought was neceſſary. It is worth enquiring of the Doctor, within what Period of Time this *abundance of Inſtances* happen'd; for if they all preceded *Bagot*'s Caſe, it is ſtrange they did not prevent it; or that that Caſe ſhould ever have troubled the Courts of Juſtice, had the Authority of Kings *de Facto* been held unqueſtionable. But after all, if ſome ſuch Inſtance ſhould be produced, I would intreat him to conſider, whether thoſe *Grants* of the Three *Henrys*, that ſhould be *found to be allowed in the Courts*

of

of Edward IV, did not owe their Validity entirely to the Confirmation of that King. For if this should prove to be the Case, I may then safely appeal to the most partial of his Friends, whether this Argument from the *Grants*, &c. of the Three *Henrys*, can do this Cause any Service. But it will be time enough to insist upon this, when the Doctor's Instances are brought to Light.

As for the *Grants*, &c. of *Richard* III, which, he is pleased to affirm, were likewise admitted as valid in several Instances by *Henry* VII.'s Judges; I must beg Leave to think this another Mistake of the Doctor's; because I have not been so fortunate, as to meet with any such in my Search: However I am persuaded, they will not turn to his Account, should they ever appear; for Reasons, which shall be given in their proper Place.

I AM now arrived at that famous Case, which the Doctor calls *Decisive*; and believes to be an indisputable Proof, that the Law of *England* ascribes a full and complete Authority to Kings *de Facto*, by allowing all their Grants and Regal Acts to be valid and effectual to all Intents and Purposes. I shall beg the Liberty therefore to lay it before the Reader in a more exact and ample Manner, than I think has been hitherto done; some Circumstances having been omitted in former Representations of it, which, if I mistake not, are very fit to be observed, in order to make a right Judgment of it. The Case is this.

'(*n*) KING *Edward* IV. in consideration of the 'good Services done him by *J. Bagot*, grants by his 'Letters Patent (*Anno* 4 *Edward*. 4^{ti}) to him and *W. Swirendon* in Conjunction, or to the Survivor of them, the Office 'of Clerk of the Crown in *Chancery*, after the Decease or 'Surrender, *&c.* of one *William Rous*, then in Possession 'of it. *Anno* 6to *Edw*^{di} 4^{ti} *William Rous* surrenders this 'Office; and then the said *Swirendon* and *Bagot* immediately take Possession of it, by Virtue of the Letters 'Patent beforementioned; and continued in this Office, 'till one *Thomas Ives* disseized them of it, upon Pretence 'likewise of Letters Patent dated *Anno* 6to *Edw*^{di} 4^{ti}. '*J. Bagot*, *&c.* upon this commence a Suit against *Thomas Ives*, in which the said (*o*) *Ives* being Defendant, al- 'ledges against *Bagot*, that he was an Alien, born out of 'the Allegiance of the King of *England*, and under the 'Obedience of *Charles* King of *France*, the King's great

(*n*) 9 Edw. 4. 3 Term. Trin.

(*o*) 7 Edw. 4. 17 Term. Hil. 9 Edw. IV. 3 Term. Trin.

'Adver-

'Adversary and Enemy. *Bagot* upon this shews a *Patent* 'of *Naturalization*, (p) granted him by King *Henry* VI. 'in the 37th Year of his Reign: *Ives* replies, *That all* 'the *Regal Acts of the Three* Henrys (q) *being annulled by* 'Act *of Parliament*, *that Patent was consequently of no Au-* 'thority. (r) Some time after came on another Tryal be- 'tween *Bagot* and *Ives*; and then the Act of Parlia- 'ment alledged by the Defendant, to invalidate the Patent 'granted by *Henry* VI. was considered; and it was affirm- 'ed by *Bagot*'s Counsel, That notwithstanding that Act, 'the *Patent of Naturalization* granted to *Bagot* was good; 'for King *Henry* was *King in Possession*; and it was requi- 'site, that the Kingdom should have a King, under 'whom the Laws might be kept, and Justice administred: 'Therefore altho' he was *King only by Usurpation*; yet 'every *Judicial Act* done by him, which concerns the 'Royal Jurisdiction, shall be good, and shall bind the 'King *de Jure* at his Return; and then they instance in 'a Pardon of *Felony*, a License of *Mortmain*, a *Grant of* '*Ward*, *&c.* And that therefore the King that now is, 'shall have Advantage of all Forfeitures made to *Hen-* 'ry VI; and for a Trespass committed in his Time, the 'Writ shall run, *contra Pacem Henrici 6ti nuper de Facto* '*& non de Jure*; and a Man shall be arraign'd for Trea- 'son committed against the said King *Henry*, in compas- 'sing his Death: And therefore such *Judicial Acts* made 'by the said King *Henry* shall be good, provided they 'are not to the Diminution of his Crown; for then they 'shall be voided by the King that now is, in his *ancient* '*Right*. Besides, this King *Henry* was not meerly an '*Usurper*; for the Crown was entail'd upon him in 'Parliament. Then Judge *Billing* deliver'd his Opinion, '*That it belonged to every King, by reason of his Office, to do* '*Justice, and shew Mercy; Justice in executing the Laws,* '*and Mercy in granting Pardon to Felons, and such a Legi-* '*timation, as this of* Bagot's, *&c.* And lastly, it was 'said, That if he, who is now King, had granted a Char- 'ter of Pardon in the Time of *Henry* VI. it would have 'been now void; for every one, that shall grant a Char- 'ter of Pardon, ought to be King *in Fact*, (s). And where-

(p) 9 Edw. 4. 3 Term. Trin.
(q) 7 Edw. 4. 17 Term. Hilar.
(r) 9 Edw. 4. 2 Term. Pasch.
(s) *The Year-Book ends this Hearing with these Words*, Et adjornatur. Et à cette jour les Justices ne arguer, eins les Serjeants & Apprentices, i. e. *Only the Serjeants and Apprentices on both sides argued that Day, and not the Judges.*

'as

as it had been urged by the *Defendant*, and his Counsel laid great (*t*) Stress upon it, That *Bagot* was an *Alien*, born in the Dominions of *France*, out of the King's Allegiance; this is utterly denied by (*u*) *Bagot*, who says, That his Parents were both *English* by Birth; and that he was born the King's Subject in his Duchy of *Normandy*; and the same is likewise affirmed in the (*x*) *Letters Patent* of *Henry* VI. On the other hand, (*y*) the *Serjeants* and *Apprentices*, who were of Counsel for *Ives*, would not allow these Letters Patent of *Henry* VI. to be good; *For*, say they, *the King must not be in a worse Condition, than any common Person. If a common Person is disseized, and recovers Possession again, he shall defeat all the mean Acts; therefore the King shall do the same, now that he enjoys his Right, descended to him from King* Richard. *Besides, this Act* (*viz.* the 1st of *Edward* IV, which voids the Acts of the Three *Henrys*) *is nothing else, but an Affirmance of Common Law; therefore by his Regress he has voided all Acts made by the Usurper; and upon this Account it is, that in the said Act he has excepted all Judicial Acts*, &c. *and declared them good; but for the Validity of these Letters Patent, no Provision is made in it.* And then as a farther Proof, that the Acts of a King *de Facto* are of no Authority, they add; *That a League made between King* Henry VI. *and any other Foreign Prince, tho' intended for the Advantage of the Realm, shall not bind the King that now is.* And at the last (*z*) Hearing of this Cause, Judge *Bryan* opposed the giving Judgment for *Bagot*, for this Reason; *because the King being now in his Remitter, as Cousin and Heir to King* Richard, *the Patent made by King* Henry, *who was only an Usurper and Intruder, was void.* At length, after several Hearings, the Judges having debated the Matter, resolv'd, (*a*) *that no Objection had been offered of Weight enough to procure an Arrest of Judgment*; and so *Bagot* was put in Possession of his Office.

(*t*) 9 Edw. 4. 2 Term. Pasch.

(*u*) 9 Edw. 4. 3 Term. Trin.

(*x*) 9 Edw. 4. 3 Term. Trin.

(*y*) 9 Edw. 4. 2 Term. Pasch.

(*z*) 9 Edw. 4. 3 Term. Trin.

(*a*) 9 Edw. 4. 3 Term. Trin.

THIS, I will presume to say, is a true and full Representation of this celebrated Case; for it was my Intention to omit nothing, that could possibly be thought material; and I am persuaded, I have executed my Design. I shall therefore with some Confidence referr it to the Reader, *First*, Whether the Doctor's Memory or Skill did not fail him, in some Parts of the View he has

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given of it. *Secondly,* Whether the Inferences he draws from it are so evident and just, as he imagines. And, *Thirdly,* Whether in Truth any Propositions can be extracted from it, that will serve his Purpose.

First, I desire the Reader's Opinion, Whether the Doctor's Memory or Skill did not fail him, in some Parts of the View he has given of this Case: For he tells us with no little Assurance, (*b*) *That the opposite Counsel did not deny any one of the Points of Law maintained in* Bagot's *Plea*; and then with an Air peculiar to great Writers, asks the Question; *Wou'd not the Counsel on the other side have contradicted or answered, if they could, what had been urged in behalf of* Bagot, *as it concern'd their Client's Cause?* I confess, it is not without some Amazement, that I look upon these Passages in the Doctor's Book; and I now appeal to the Reader, whether there is not reason for it: Let him but cast his Eye upon what I have just now recited; and let him judge between us, whether the following Words do not contain a direct and full Answer made by *Ives*'s Counsel to that of *Bagot.* And (*c*) *on the other side* (that is, *Ives*'s) *it was touched by the Serjeants and Apprentices, that the Letters Patent shall be void; for the King (the King* de Jure*) must not be in a worse Condition, than any common Person. If a common Person is disseiz'd, and recovers Possession again, he shall defeat all the mean Acts; therefore the King shall do the same, now that he enjoys his Right, descended to him from King* Richard. *Besides, this Act* (viz. 1 *Edw.* IV, which voids the Acts of the Three *Henrys*) *is nothing else, but an Affirmance of Common Law; therefore by his Regress he has voided all Acts made by the Usurper; and upon this account it is, that in the said Act he has excepted all Judicial Acts,* &c. *and declared them good; but for the Validity of these Letters Patent, no Provision is made in it.* I would now leave it to the Doctor himself, what can be the Meaning of these Words? Is it not plain from them, that the Plaintiff's Counsel denied what the Defendant's affirmed? *Bagot*'s Lawyers are positive, that *Henry* VI.'s Letters Patent are good; because all Judicial Acts done by an Usurper shall be good, and bind the King *de Jure* at his Return. But *Ives*'s Lawyers answer, that these Letters Patent shall be void; because otherwise the King should be in a worse Condition, than a common Person, *&c.* and therefore they

(*b*) *View of the* English *Constitution,* p. 17. *And Defence,* p. 58.

(*c*) 9 Edw. 4. 2 Term. Pasch.

they add, That all Acts done by an Usurper are void; and that even the Judicial Acts had not been good, but by Virtue of *Edward* IV.'s Confirmation; but then they deny, that these Letters Patent could come under the Denomination of Judicial Acts. Is not this a manifest Contradiction to the Plea of *Bagot*'s Counsel; and a plain Denial of the Points of Law contain'd in it? And if it is so, I must be allowed to say, the Doctor has not fairly represented the Case.

Secondly, Bagot's *Case*, says our (*d*) Author, *is the only one, where the Authority of a King* de Facto *had ever been disputed; and yet even then not disputed at Common Law: For the Counsel against* Bagot *seem'd well enough aware, that the Authority of a King* de Facto *was good at Common Law*, &c. Nothing surely can be more directly contrary to the express Words of *Ives*'s Counsel, than this Assertion of the Doctor's; for as they lie in the *Year-Books*, they are these which follow. (*e*) *That Act* (meaning the First of *Edward* IV, which annulls the *Acts* and *Grants* of the Three *Henrys*) *is only an Affirmance of the Common Law; and therefore King* Edward, *at his Regress, voided all the Acts made by the Usurper*, &c. Does it appear from hence, that they *were aware, that the Authority of a King* de Facto *was good at Common Law*; when they undeniably affirm, *that by Common Law all the Acts of Usurpers are to be declared void?* I am ashamed of making the Reflexions, which are natural upon this Occasion.

(*d*) *View*, p. 14.

(*e*) 9 Edw. 4. 3 Term. Trin.

Secondly, I am now to enquire, whether the Inferences he draws from this Case, are so evident and just, as he imagines. And in order to this, I must desire it may be remember'd, that the Grand Position, which, the Doctor would persuade us, is demonstrable from the (*f*) Proceedings now before us, is this; *That the Authority of a King* de Facto *was fully own'd and acknowledged in the Courts of Judicature of King* Edward IV, *a King* de Jure. And this (*g*) he is pleased to inferr, *First*, From the Pleadings of *Bagot*'s Counsel; and *Secondly*, From the Judgment, which was at length given for him. I shall now consider the Force of the Doctor's Arguments, from which he deduces his Conclusion; and I think I shall be able to make it appear, that they will by no means serve his Purpose.

(*f*) *View*, p. 8, &c.

(*g*) P. 50.

First, He inferrs from the Plea of *Bagot*'s Counsel, that the Law allowed of the Authority of Kings *de Facto*.

But

But might not that Counſel err in thoſe Points, which they urged for Law? And were they exempted from the common Infirmities, which the ableſt Lawyers have been ſubject to, of being ſometimes miſtaken? The Doctor indeed, as aware of this Objection, tells us, (*h*) *The oppoſite Counſel would certainly have denied theſe Points of Law, if they were not evident.* But I have already ſhew'd, that the Doctor's Accuracy here fail'd him; nothing being more true, than that *the oppoſite Counſel did deny the Points of Law maintain'd in* Bagot's *Plea.* So that here we have Counſel againſt Counſel; and conſequently (according to the Doctor's Way of Reaſoning) Law againſt Law; and then the Queſtion ſtill remains, which Side was on the Right; and which it was, the Law did really favour; ſo that the Authority of Kings *de Facto* is not yet a decided Truth. The Doctor therefore ſeems to be ſenſible, that his Aſſertion needed a farther Support; and for that Reaſon asks, (*i*) *Can any Man believe, that in the Courts of* Edward IV, *who had waded through ſo much Blood to the Throne, and was ſo jealous of any thing, that favoured the* Lancaſtrian *Kings, they durſt have made this Plea, if they had not known it to be Law?* To this I anſwer; I ſee nothing in this Plea, which could give any juſt Offence to *Edward* IV, or his Party: For that Prince had only Cauſe to be jealous of thoſe Opinions, that favoured the Right and Claim of the *Lancaſtrian* Kings; not of ſuch, as only aſſerted the Reaſonableneſs of allowing the *Judicial Acts* of the Three *Henrys*, and ſuch other, as were neceſſary for the *Order of Government* in general, and were not prejudicial to his own Title; which, I doubt not, will appear to be the only Uſe, that can be fairly made of this Plea. But ſuppoſing the Caſe to be as the Doctor repreſents it; I cannot however ſee the Neceſſity of his Conſequence; for why may it not ſometimes happen, that a Counſel ſhould uſe an undue Liberty in their Pleadings; and that in a Point of Moment too, without any real Warrant from Law; and yet meet with no Reprehenſion from the Judges? Is Modeſty inſeparable from the Gentlemen only of that Profeſſion? Or is it impoſſible for Courts of Juſtice to be guilty of too much Lenity and Patience towards thoſe, who would have their Boldneſs paſs for Law? I freely own, that if the Judges underſtood the Plea of *Bagot*'s Counſel, in the

(*h*) *View*, p. 17.

(*i*) *View*, ibid.

the Sense the Doctor does, and thought they were in the Wrong, they ought to have resented their Presumption, and rebuked them for it; but if they thought them in the Right, and believed they said nothing, but what was agreeable to the Laws; why then did they suffer *Ives*'s Council to argue with that Confidence, against so sacred a Thing as the *Constitution?* Behold, how audaciously they affirm to the Court, (*k*) *That the King* de Jure *shall defeat all the mean Acts of the King* de Facto, *when he recovers his Right. That the first of* Edward IV, (which voids the Grants of the Three *Henrys*) *is nothing else, but an Affirmance of Common Law, which gave him Authority to void all the Acts of the Usurper his Predecessor.* Were there ever more scandalous and insufferable Affronts offer'd to the Laws and Constitution of *England*, in the Doctor's Opinion? And therefore surely the Serjeants and Apprentices, who ventured to utter them, ought to have felt the Weight of the Judges Indignation for such unparallel'd Boldness: But since it appears, they escaped with Impunity, will the Doctor therefore give his Adversaries Leave to inferr, that the Court allowed of their Plea? Have they not the same Right to reason after this Manner, as the Doctor has? And if his Argument thus returns upon him; it will become him to be sensible, that it is not worth his while to insist upon it. Upon this Occasion I hope it will not be impertinent to put him in mind of a Passage, which happen'd at the Tryal of *Algernon Sydney.* That Gentleman had been charged with Writing some treasonable Papers found in his Closet; he denies indeed, that he wrote them; but after the Reading them in Court, he had the Confidence to say, he did not know, why any body should be ashamed of being the Author of them. (*l*) *For* (says he) *they seem to be an Answer to* Filmer, *who maintains this Principle, That 'tis the same thing, whether a King come in by Election, by Donation, by Inheritance, or Usurpation, or any other way; than which I think never was a thing more desperately said.* Cromwell, *when one* White *a Priest wrote a Book, wherein he undertook to prove, That Possession was the only Right to Power; though he was a Tyrant, and a violent one, thought it so odious a Principle, that he would not endure it, and used him very slightly for it. Now this* Filmer *is the Man, that does assert it, that 'tis no matter, how they come by their Power;*

(*k*) 9 Edw. IV. 2 Term. Pasch.

(*l*) *Tryal of* Argernon Sydney, *p.* 32, 33.

and gives the same Power to the worst Usurpers, as they, that most rightly come to the Crown. By the same Argument, if the errantest Rascal of Israel *had killed* Moses, David, *&c. and seiz'd upon the Power; he had been possessed of that Power, and been Father of the People. If this be Doctrine, my Lord, that is Just and Good, then I confess it may be dangerous for any thing to be found in a Man's House contrary to it*, &c.

Now the Use I would make of that Passage, is this; It is plain, it contains a Doctrine directly opposite to a very considerable Part of the *English* Constitution, if the Doctor is in the right: It is utterly inconsistent with those Notions, which he maintains are evidently supported by the *Common and Statute Laws* of his Country, and have been confirmed by the constant Example and Practice of the greatest Men, for above Six Hundred Years: And yet the *Chief Justice*, the *Judges* then upon the *Bench*, the *Attorney* and *Solicitor-General*, and the rest of the King's Learned Counsel permitted the Laws of the Nation to be arraigned in so publick a Manner, without the least Censure or Reproof. I would now ask the Doctor, if I might presume so far, Whether such an Omission in those that presided at that Tryal, could fairly be interpreted as a Concession, that what Mr. *Sydney* said was true?

(*m*) *View of the* English *Constitution*, p. 17, 18.

Lastly, the Doctor (*m*) concludes, from the Judgment given in Favour of *Bagot*, that the Court plainly declared for the *Validity of the King* de Facto's *Patent*; *and consequently of his Royal Jurisdiction, though not confirmed by the King* de Jure, *in a Statute made expresly for that Purpose.*

These Words are home, I confess; and would be fully to the Doctor's Purpose, if they were true; but that I must beg Leave to doubt of, for the following Reasons:

First, Because the Judgment for *Bagot* did not necessarily imply the Validity of the Patent of *Henry* VI.

Secondly, Because, supposing the Patent of *Henry* VI. were declared valid by Virtue of this Judgment; yet it would not be a good Proof of his Authority in the present Question.

First, I say the Judgment for *Bagot* did not necessarily imply the Validity of the Patent of *Henry* VI, upon the Certainty of which the Doctor entirely depends in his present

present Argument; for he does not pretend to inferr the Authority of a King *de Facto* from any other *Medium*, but that of the Validity of his Patent: But if that cannot be proved from this Judgment, we are then just where we were; and we must wait for happier Discoveries, before we admit of the Authority of Kings *de Facto*.

THE Reader will be pleased to remember, that the Point aim'd at by *Bagot* in this Tryal, was to get Possession again of the Office, to which he laid Claim by the Grant of *Edward* IV; and that after several Hearings, at length the Judges declare, *That nothing had been suggested of Weight enough to cause an Arrest of Judgment*; and then they proceed to give it for *Bagot*, viz. *That he shall recover his Office*, &c. Now I must here observe, that it does not appear, upon what Grounds and Reasons they gave this Judgment; the Doctor indeed is positive, that it was by Virtue of the Patent of *Henry* VI. which they allowed to be good: But how does he know that? Was there no other Motive suggested in *Bagot*'s Plea, that could possibly induce them to determine for him? If there was; then the Doctor must confess his Cause is still doubtful. Now it is evident, that tho' *Bagot* did plead the *Patent of Naturalization* of *Henry* VI. to qualify him for this Office; yet he also *(n)* affirmed, that he was *born of English Parents in the King's Duchy of Normandy*; and consequently had a just Claim to the Rights and Privileges of an *English* Subject, tho' his Patent of Naturalization were set aside; for if this should not be allowed to be a Legal Title, we must at once reject all my *Lord Chief Justice Coke*'s Arguments *in Calvin*'s *Case*, and the several Judgments given for the *Post-Nati*, by the ablest Lawyers, in King *James* I.'s Reign; the Doctor ought not therefore to think it improbable, that the Court was influenced by this Reason, in the Judgment they gave for *Bagot*. But,

(n) 9 Edw. 4. 3 Term. Trin.

Secondly, Supposing the Patent of *Henry* VI. were admitted to be *valid*, by Virtue of this Judgment; yet this would not be a sufficient Proof, that his Authority was allowed of in the Courts of *Edward* IV: For the Patent might derive its Force only from the Authority of *Edward* IV, who confirmed it; not from any that was acknowledg'd to be in *Henry* VI. And the Truth is, this is all that *Bagot*'s *Counsel* pretended to; for it is plain they

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contend only for these Two Points: *First*, That all the *Judicial Acts of* Henry VI, should be allowed to be good. *Secondly*, That this *Patent of Naturalization* should be admitted to be a *Judicial Act:* Now the opposite Counsel very readily grant, that the *Judicial Acts* of *Henry* VI. were declared Valid by the first of *Edward* IV; but then they do not agree, that this *Patent* was of the Nature of a *Judicial Act:* So that if at last the *Court* was of Opinion, (which is not unlikely, and may be true, for any thing that appears to the contrary) that this *Patent* might very well come under the Denomination of a *Judicial Act*; it was then consequently confirmed by *Edward* IV; and therefore ought to be look'd upon as sufficient for the Purpose, for which it was produced; but then this is only a Proof of the Authority of *Edward* IV, not of that of *Henry* VI, as I before observed. The Doctor possibly may be of the same Opinion with *Ives*'s Counsel, and deny that this *Patent* was a *Judicial Act*; but then he dissents from his old Friends, the Managers of *Bagot*'s Plea, upon whose Judgment he has hitherto thought he might safely depend: And besides, it appears from another Case in the (o) *Year-Books*, that all *Acts of Record enter'd in Chancery*, may properly be term'd *Judicial Acts*; for the Chief Justice *Markham* having there questioned the Authority of *Coroners* chosen in the Time of *Henry* VI, *Yelverton* and *Choke* answer, (p) *That the Election of a Coroner being certified in Chancery, is an Act of Record, and a Judicial Act; in which Case, all Judicial Acts done in the Time of the last King, are affirmed by the King and all his Council.* Which does not only furnish us with a fresh Confutation of what the Doctor had affirmed, *viz. That* Bagot's *Case was the only one, in which the Authority of a King* de Facto *had been ever disputed*; but also seems to be a clear Proof, that *Bagot*'s *Patent of Naturalization* being an *Act of Record*, ought to be look'd upon as a *Judicial Act*. So that after a due and full Examination of this famous Case, which has so often been appealed to, and is insi-

(o) 4 Edw. 4. 3 Term. Hilar.

(p) Quant a ceo qui est dit, que les Coroners avaunt dit, ne fuerent novellement eslues en Temps, le Roy qui ore est, issint que ils ne sont Coroners a Roy. 1. al Roy qui ore est, &c. Semble que ils sonti; Car le Coroner n'ad Commission, si come auter Minister ad, ou come auter Judge ad; mes per bref le Roy il est eslue; quel Election certifie en le Chancery est Act de Record, & *Judicial Act*, en quel Case al *Meins Judicial Acts* fait en Temps le Roy qui fuit, sont affirme par le Roy & tout son Conseil, 4 Edw. 4. 3 & 4 Term. Hilar.

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sted upon by the Doctor, as *decisive* in the present Controversy; we are still as much in the Dark as ever: It is not certain that the *Judges* thought *Henry* VI.'s *Patent* was valid; or if they did, it is not certain, but they might think so from the Confirmation of *Edward* IV, not from any Authority it deriv'd from *Henry* VI; and therefore it remains still to be proved, That the *Courts of Judicature* fully acknowledged the Authority of Kings *de Facto*.

I MIGHT now very excusably dismiss this Argument, and persuade myself, I have said enough to render it useless and unserviceable to the Purpose, for which it has been urged; but possibly it may be expected, I should take a little more Notice of the *Points of Law* (as the Doctor is pleas'd to call them) contain'd in the Plea of *Bagot*'s Counsel: I shall therefore now endeavour to gratify him in this respect; and I doubt not but to make it appear, that these *Points of Law*, understood in his Sense, do certainly prove too much; but if we are to understand them according to their natural, obvious, and, I think, only true Meaning; they will then as manifestly prove too little.

First, I say, these *Points of Law*, understood in the Doctor's Sense, do certainly prove too much; because the Authority of all Governments *de Facto* may as well be inferr'd from them, as that of Kings *de Facto*: Which is more than the Doctor will be willing should follow from any of his Positions. For when his Adversaries had objected, that his Arguments had a plain Tendency to maintain the Legality of all the Publick *Acts* of the *late Republick*, and *Oliver Cromwell*; it is observable, with what Indignation (*q*) he resents the Charge of such a Consequence; and reproaches them with the Guilt of that Absurdity, which they intended to fasten upon him: But how great soever may be the Displeasure I must expect to incurr by this Imputation; it is to me evident, that the Reasons made use of by *Bagot*'s Counsel, will serve the Cause of a *Commonwealth*, as well as that of a King *de Facto*: As will easily appear by a particular Examination of them.

(*q*) *Defence*, p. 106.

First, It is said to be necessary, *the Realm should have a King, under whom the Laws should be kept and maintained.* Very good; but a *King* then is only necessary for the sake of Government: And may not that End be obtain-

ed under a *Commonwealth?* The Laws may be better executed perhaps by a *King*, than a *Cromwell*, or a *Republick*; but if a King is not to be had, it is *necessary* to have some other *Government*; because otherwise the Laws could *not be kept, nor maintained.* To whatsoever Powers therefore we are beholden for that Benefit; they must have the same Authority, as a King *de Facto.* The Counsel proceed; *Therefore altho' he was in but by Usurpation; yet every Judicial Act done by him, concerning the Royal Jurisdiction, shall hold good, and shall bind the King* de Jure, *when he returns to the Crown*, &c. *Thus Charters of Pardon shall be good*, &c. Their Argument is still grounded upon the Principles of common Justice and Equity; and why may not these take place under a *Commonwealth*, as well as a *Monarchy?* They go on; *The King that now is, shall have the Advantage of all Forfeitures made to King* Henry VI. True; and so had King *Charles* II. the *Forfeitures* made to the *Commonwealth:* And therefore according to this Argument, the *Commonwealth* was a Legal Government. It follows; *And for a Trespass committed in* Henry VI.'*s Time, the Writ shall run* contra pacem Henrici 6ti nuper de Facto & non de Jure.

Here, I confess, I am at a Loss how to proceed; for I am loath to believe, that for Trespasses committed under the *Commonwealth* or *Oliver Cromwell*, the Writs should run (in the Reign of King *Charles* II.) *contra Pacem Reipublicæ*, or *contra Pacem Oliveri nuper Angliæ Protectoris, &c.* and yet, according to the Doctrine of *Bagot*'s Counsel, and the Doctor's Principles, it seems to be unavoidable. For how could an Indictment for Crimes committed under the *Commonwealth* otherwise be formed? Surely it would not be proper to say, That *Trespasses committed under* the late *Republick*, were *contra Pacem Caroli Regis*; for he being out of *Possession*, could not grant a *Pardon.* [*View.* p. 16.] He could afford his Subjects no *Protection*, and therefore no *Allegiance* was due to him. [*View*, p. 52. *Def.* p. 111.] But after all, I find myself mistaken; for it was *Resolved by all the Judges, that the Indictment for the Murder of King* Charles I. *should conclude*, contra pacem nuper Domini Regis, & dignit. suas, necnon contra pacem Domini Regis nunc, coron. & dignit. suas. And it was likewise declared by them, *That tho' King* Charles II. *was* de Facto *kept out of the Exercise*

Exercise of the Kingly Office by Traytors and Rebels; yet he was King both de Facto *and* de Jure. [*Kelyng's Reports*, p. 11, 15.] Now the Question is, Who were the better Lawyers, *Bagot*'s Counsel, or these Judges? If the latter, then *Henry* VI. was not so much as King *de Facto*.

THE next Point seems to be peculiar to the Case of *Henry* VI; and not extensive enough to be applied to all Kings *de Facto*. It is this: *A Man shall be arraign'd for Treason against King* Henry VI. *in compassing his Death; because the said King was not meerly an Usurper*, &c. I say, this is a Privilege, which belongs only to such Kings, as are not *meerly Usurpers*; and therefore will not prove the Authority of Kings *de Facto* in general; which was the Doctor's proper Business. It is true, my Lord Chief Justice *Hale* (in his large *Pleas of the Crown*, not yet printed) is of Opinion, That *Treasons committed against an Usurper, or* Rex de Facto & non de Jure, *shall be punished after the Regress and Obtention of the Crown by the Right Heir*. But then he affirms this with such Limitations, as I fancy will not be very acceptable to the Doctor: His Words are these; (r) *If there be a Treason committed against the Usurper, which referrs not to the Competition of the True Heir, as counterfeiting the Coin or Seal of the Usurper, compassing his Death by Treachery*, &c. *these Treasons have been punished notwithstanding the Regress of the Right Heir, and in his Time*, 9 Edw. 4. 1. 4 Edw. 4. 20. *For these are indeed Offences, that are rather against the Interest of Kingly Government, than the Interest of the Usurper. But if the Treasons be such Acts, as were done in the Right and Assistance of the Right Heir to the Crown; these are purged by the Regress and Obtention of the Crown by the Right Heir.*

(r) Hale's MS. Hist. Plac. Coronæ, *Vol.* 1. *c.* 13.

I INTREAT the Reader now to judge, whether the same thing may not be said, with relation to the same Offences committed under a Commonwealth. Are they not such, as are rather against the Interest of Government in general, and therefore deserve to be punished even by a King *de Jure* at his *Restauration*? To return to the *Points of Law* insisted upon by *Bagot*'s Counsel; they add, *Any Gifts or Grants made by King* Henry, *which were not to the Diminution of the Crown, shall be made good*. If these Words are to be understood without any Restriction, they are not true; for *Edward* IV. did by Act of Parliament vacate several Grants of *Henry* VI. which were

not

not to the *Diminution of the Crown*; and surely the Counsel would not say, he could not do that lawfully, which he had actually done by Law. But if they mean no more, than that *many Gifts or Grants made by King* Henry, *which were not to the Diminution of the Crown, shall be made good*; this will admit of no Dispute: But then what Reason can be assign'd, why a Commonwealth should not have the Benefit of the like Plea? The last Particular, that was urged in this Case, was, *That if he that is now King, had in King* Henry VI.*'s Time granted a Charter of Pardon, it would be void now; for every one that shall grant a Charter of Pardon, must be King in Fact.* This may in some Sense be true, and yet be of no Advantage to the Cause of Kings *de Facto:* For if by *Henry* VI.*'s* Time, we are to understand the *Time* preceding the 4th of *March*, when *Edward* IV. first took upon him the Name and Authority of a King; undoubtedly a Pardon then granted by the said *Edward*, could not be good; because he had not yet publish'd his Claim to the Crown; nor made use of the Regal Style. But the Reason subjoin'd plainly shews, the Counsel were of Opinion, That *no Pardon granted by a Prince out of Possession, could be valid.* Now I might question whether this was held to be Law at King *Charles* II.'s *Restauration*; for when some of the *Regicides*, at their Tryal, laid hold on the King's Declaration made at *Breda*, as a Grant of Pardon; they were told by the Chief Baron and Solicitor General, that it could only be a Pardon in Honour, not in Law; because it wanted the Broad-Seal; which Answer (*s*) seem'd to imply, That if it had been under the *Broad-Seal*, it would have been a Legal Pardon, tho' granted by a *King out of Possession.* But if the Doctor will insist upon it, as a good *Law*, that a King out of Possession has no manner of Authority; certainly, in the Time of King *Charles*'s Exile, *Cromwell* had as much the Benefit of that Law, as if he had been King *de Facto.*

(*s*) *It does not bind him in Point of Law, unless there were a Pardon granted by the Broad-Seal. These are Chief Baron* Bridgman*'s Words, at the Tryal of Mr.* Cooke. *Tryal of the* Regicides, *p.* 145.

I HAVE now gone through the Doctor's *Points of Law*; and have shewed, that the Equity of them will undoubtedly extend to all Governments, as well as to Kings *de Facto.*

BUT, *Secondly*, If we understand these *Points of Law* in their proper and natural Signification; they prove no more, than that under an *Usurper* the Course of *Judicial*

† *Proceed-*

Proceedings ought to go on, which consist partly of *Acts of Justice*, and partly of *Acts of Grace*; of which latter sort were *Patents* of *Naturalization*, as Judge *Billing* urged; that during the Exclusion and Exile of the Rightful Prince, the Order of Government should still be preserved, and consequently the Laws put in Execution; and that therefore all such Acts as these, tho' performed by an Usurper, (since they had no other End and Tendency, but to maintain the Peace and Quiet of Society in general, and did not directly oppose the Claim, or weaken the Interest of the Lawful Heir) ought in Reason and Equity to be declared good and valid to all Intents and Purposes. This, I say, is the utmost, that can fairly be inferred from the *Plea of* Bagot's *Counsel*, without doing Violence to the plain and obvious Meaning of it; and indeed it would not be reconcilable with those avowed Principles, by Virtue of which *Edward* IV. gained the Crown; nor consistent with itself, were the Doctor's Exposition of it admitted as genuine. It would not be reconcilable with the Principles that placed *Edward* IV. upon the Throne; because it utterly destroys the Distinction between King *de Facto*, and King *de Jure*, by supposing Allegiance to be due only to the Prince in *Possession*. And for the same Reason it is inconsistent with itself; because it allows of this Distinction, and confesses that *Henry* VI. was King only by *Usurpation*; a Term which manifestly implies Unjust Possession; and consequently such, as the Law gives no manner of Countenance or Approbation to. On the other hand, the Sense which I have now given of it, is attended with no Inconveniencies, nor liable to any Objections. It maintains inviolably the Right and Authority of Kings *de Jure*; and yet allows to the *Judicial Acts* of a King *de Facto*, and all other that were done purely for the Preservation of the Community, an equitable Title to a Confirmation from the King *de Jure*. And this indeed is all that *Bagot*'s Counsel had Occasion to demand; for this being admitted, they had Reason to hope, the Patent of *Naturalization*, granted by *Henry* VI, would come under the Denomination of a *Judicial Act*; and then their Clients Cause could be in no Danger.

I MUST beg Leave to observe one thing more, before I have done with this tedious Plea; and that is,

 that

that the Counſel argue only for the Validity of the Acts of *Henry* VI, not of Uſurpers or Kings *de Facto* in general, as the Doctor does; for they tell us, that *Henry* was King in Poſſeſſion; and that though *he was ſo by Uſurpation, yet he was not meerly an Uſurper.* But it ought not to be from hence inferred, that this muſt be the Caſe of every King *de Facto*; or that all Kings *de Facto* ought to have the ſame Privileges, that it might be thought reaſonable to allow *Henry* VI: For every Uſurper may not have the ſame Plea, as thoſe of the Houſe of *Lancaſter* had, eſpecially the two laſt of them, who had obtained the Promiſes and Oaths of the *Undoubted Heirs*, for the Security of their Reign. I do not ſay, the Houſe of *York* had hereby laid themſelves under any *Legal Obligations*, never to lay Claim to the Crown; for the Judgment given afterwards in Parliament againſt *Henry* VI, ſhews the contrary: But it may be very well doubted, whether thoſe repeated Oaths, which were taken likewiſe with ſo much Solemnity, ought not to have had a greater Weight upon their Conſciences, than it appeared they had; and it is to be feared, the Calamities which befell the *Duke of* York *and his Iſſue*, are in a great Meaſure to be attributed to the little Reverence that Family paid to *Oaths*, and the ſlender Care they took to perform them. However, though *Edward* IV. poſſeſs'd himſelf of the Crown, without any Regard to theſe Obligations; he could not but be ſenſible, that *Henry* VI. deſerved to be conſider'd with ſome Diſtinction, as one that had a Right to better Uſage, than Common Uſurpers; for he had lived under him many Years in great Honour and Proſperity; and ſeem'd contented and ſatisfied with his Government: So that he had Reaſon to look upon the Acts of *Henry* VI. as done by his own Conſent and Approbation; and therefore might think himſelf obliged in Prudence and Decency to ratify and confirm them. But the Doctor knows the Caſe is very different of *Uſurpers*, who never had ſo much as the Appearance of the Conſent of the Right Heirs for their Poſſeſſion; and therefore are neceſſitated to maintain themſelves in the Throne by Force and Violence.

The Doctor's laſt Remark upon this Caſe, is taken from *Brook*'s *Abridgment*, whoſe Words he ſets down; but they amount to no more than this, *That it is ſaid,*

and

and not contradicted, that for Treason committed against a King de Facto, *the Party shall be arraign'd under a King* de Jure. How little this is to the Doctor's Purpose, I have already in some Measure shewed; and need at present only take Notice of the Method of Reasoning here made use of; *It is said, and not contradicted*; be it so: But is it not said likewise by the opposite Counsel, and *not contradicted*, *that the King shall not be in a worse Condition, than any common Person; and that therefore he shall, at his Return, defeat all the mean Acts of the Intruder*; and that the first of *Edward* IV. (which annulls all the Acts and Grants of *Henry* VI.) *was only an Affirmance of Common Law?* Do *Bagot*'s Counsel make any Reply to this? Or do the Judges pass any Censure upon it? Is not their Silence therefore as much an Argument of their Consent, on this Side of the Question, as my Lord *Brook* would have it on the other?

THERE is indeed a remarkable Case in the *Year-Books*, not taken Notice of by the Doctor; which yet may be thought more to his Purpose, than any of his other Citations from those Volumes: I shall here therefore lay it before the Reader, that I may be acquitted of any Intention of concealing what may seem to countenance the Opinion I write against. It is this which follows: (*t*) Ralph Grey *Knt. being taken in actual Rebellion against* Edward IV, *in the Castle of* Brambrough; *he was carried to* Doncaster, *and there deprived of the Honour of Knighthood in an ignominious Manner; his gilt Spurs being hewed off his Feet; his Sword and all his Armour being likewise broken and taken from him in the open Field. After this he was Beheaded; and the Reason of this Severity against him, was, for his Perjury and Doubleness, as well towards the late King* Henry VI, *as* Edward IV, *that now is.* I confess there is an Appearance of Difficulty in this Passage, which I shall endeavour to explain.

WE are told by (*u*) *Holinshead*, that this *Sir* Ralph Grey *had sworn to be true to* Edward IV, and consequent-

(*t*) 4 Edw. 4. 4 Term. Pasch. *Et le dit Sir* Ralph Grey *fuit cary a* Doncastre, *& la fuit Deprive del Honor del Chevalier devant mults del People le Roy. 1. ses gilt Spores hewes de ses pees, & son espee & tout son armour sur luy debruse & pris de luy en le champe, & puis il decolle. Et le cause del cel punishment de luy en tiel maner, fuit per cause* de son Perjury & Doublenesse que il avoit fait al Roy Henry le Size jadis Roy, &c. & auxy al Roy Edward le Quart, qui ore est, &c.

(*u*) Chron. A. D. 1463.

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ly had deserted *Henry* VI, to whom before he had taken an Oath of *Allegiance*; but surely this could not be the *Perjury and Doubleness*, for which he is here said to be punished by *Edward* IV; for then it must have been unlawful to embrace his Interest; and those numerous *Attainders*, which were passed against the Adherents of *Henry* VI, were so many Instances of the highest Violence and Injustice. Was Fidelity to the House of *Lancaster* at the same Time a Crime, and a Duty? That is, was it Treason against *Henry* VI, to revolt from him, and at the same Instant, Treason against *Edward* IV, to adhere to him? Certainly no Government could be guilty of such a Contradiction; or if it could, this wonderful Piece of *Justice* would have been most conspicuous in the Execution of the Duke of *Somerset*; who (*x*) was most remarkably guilty of a Breach of his Allegiance to both those Princes; and yet we no-where find this *Doubleness* charged upon him, as Part of his Indictment. My Lord Chief Justice *Hale* therefore delivers it as his Opinion, that this *Perjury and Doubleness* against *Henry* VI, of which Sir *Ralph Grey* is here accused, must be understood of some Act of Treason he had committed in the Reign of that King, which was not intended for the Service of *Edward* IV, the *Rightful Heir*. But his own Words will best explain his Meaning, which I shall therefore here set down. (*y*) *It is Treason in any Subject, while an Usurper is in full Possession of the Sovereignty, to practise Treason against his Person. And therefore although the true Prince regain his Sovereignty, yet such Attempts against the Usurper in compassing his Death, have been punished as Treason, unless they were Attempts made in the Right of the Rightful Prince; or in Aid, or Assistance of him; because of the Breach of Liegeance, which was temporarily due to him who was King* de Facto. *And thus it was done,* 4 Edw. 4. 40. 9 Edw. 4. 2. *though* Henry VI. *was declared an Usurper by Act of Parliament, the first of* Edward IV. *And therefore King* Edward *punished* Ralph Grey *with Degradation, as well as Death, not only for his Rebellion against himself, but also* pur cause de son Perjury & Doubleneſſe qu'il avoit fait al Roy Hen. 6. Thus did that *Illustrious Ornament of the Bench* understand the Case I am now speaking of; from whence it is plain, his Opinion of the Powers which belong to a King *de Facto*, is not in the least prejudicial to the

(*x*) *See* Holinshead's *Chron.*

(*y*) MS. Hist. Plac. Coronæ, l. 1. c. 10.

the *Rights of a King* de Jure; for it supposes the Allegiance due to a King *de Facto*, to be only *Temporary* and subordinate; and that it could not destroy the *indefeasible* Title of the King *de Jure*; as the *Local Allegiance* which an *English* Subject owes to a Foreign Prince, while he continues in his Dominions, does not extinguish the prior and indispensable Obligation he is under to his *Natural* Sovereign; but when his Duty calls, and Opportunity favours, he is bound to attend the Commands of his Lawful Prince. So that if this Exposition of the Case before us is admitted and allowed, the Friends to the Doctor's Notion will be no great Gainers by it. But I must confess, as reasonable as this Solution of the Difficulty may seem to be, I am by no means inclined to allow this *pretended Case* any manner of Authority in the present Question; for I am persuaded, it will be found, upon Examination, to have no Right to any Place in the *Year-Books*. I am sensible, it becomes me to be very circumspect, when I advance any thing that is singular in a Part of Learning, with which I am but slenderly acquainted: I shall only therefore propose my Opinion, with the Grounds of it; and leave its Probability to be determin'd by those, whose Profession has qualified them to be proper Judges.

I PRESUME to take it for granted, that the *Year-Books* are only authoritative, as they are faithful Reports of Proceedings in the Courts of Common Law; as they represent the *Pleadings*, and relate the Judgments given, in the several Cases, with Truth and Fidelity: For which only Reason they have been from Time to Time approved and recommended by the Judges, as proper Guides and Directions for Practice in their Courts. If it should appear therefore, that some Cases, or Passages, are inserted as adjudged in those Volumes, which were never pleaded before either Bench, and are not properly cognizable by them; their Credit ought to be suspected, as not sufficiently warranted; and to be sure they can never have any Influence upon Proceedings at Common Law. Now the Case before us is certainly liable to this and other Objections. As first, it contains an Historical Relation of the Success of *Edward* IV, against the Rebels in the North, which could not possibly be pleaded in any *Court of Judicature*; for if it had been ever

pleaded, it must have been at the Tryal of this Sir *Ralph Grey*, to whom it chiefly relates: But it is evident, several Historical Passages occurr in it, which did not happen till at least five Years after: For Instance, it appears from this Case, and our *Chronicles* agree with it, that Sir *Ralph Grey* was carried to *Doncaster*, and Beheaded soon after he was taken, which fell out in the fourth Year of *Edward* IV.'s Reign; but it is manifest likewise from this (z) same Case, that Sir *Humphrey Neville*, who was taken about the same Time, was not executed till five Years after. This Case therefore could not be *pleaded* at the Tryal of Sir *Ralph Grey*; neither can it be pretended, that it was then drawn up as a Report of the Proceedings that then happen'd; since it contains an Account of some Matters of Fact, which did not come to pass till several Years following. *Secondly*, The Proceedings here mention'd at the Tryal of this Sir *Ralph Grey*, are not usual in the Courts of *Common Law*; but seem rather to be the Practice of the *Court Marshal*: And the Truth is, (a) *John Stow* assures us, that *Sir* Ralph Grey *had Judgment given upon him by the* (b) *Earl of* Worcester, *High Constable of* England; whose Relation of this Matter is approved of by Mr. (c) *Selden*; so that then this Judgment was given in a *Court Marshal*, (d) *where absolute Power, and not the Laws of the Land, take place*; which must very much increase our Wonder, how it came to find Room in the *Year-Books*, which were most certainly drawn up and published for the Service of the *Common Law Courts*. We are not like to be resolved therefore by this *Case*, in the Question about the Authority of Kings *de Facto*; for when we enquire after their Power, and desire to be informed by what Laws they pretend to challenge Allegiance; I believe few will be contented with such an Answer, as referrs them only to *Martial Law* for Satisfaction. *Thirdly*, We have just Exceptions against this *Report*, if it may be called so, in another respect; and that concerns the Truth of the principal Facts re-

(z) Stow *says the same*, Chron. p. 422.

(a) *Annals*, p. 418.

(b) John Tiptoft *Earl of* Worcester, *being made Constable of* England *by* Edward 4. *played the Part, as it were, of the Butcher in the cruel Execution of divers Men of Quality.* Camden's Britannia, *at the End of* Worcestershire.

(c) *Titles of Honour*, c. 5. p. 654.

(d) *Dr.* Higden's *Defence of his View*, p. 85. *And see Sir* Francis Bacon's *Case of the* Postnati, *p.* 53. *in his* Resuscitatio, *concerning Martial Law.*

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lated in it. We are told in this *Case*, that Sir *Ralph Grey* was actually *degraded of the Order of Knighthood*, in an ignominious manner; *That his gilt Spurs were hewen off his Feet, his Sword and all his Armour broken and taken from him*, &c. But in *John Stow*'s Account, which has had the Honour to be credited by Mr. (*e*) *Selden*, this Part of the Sentence, which related to *Degradation*, was pardon'd. It may not be amiss to set down Mr. *Stow*'s Words, that the Reader may the better judge of the Difference between him and the *Year-Books*.

(*e*) *Titles of Honour*, c. 5. p. 654.

(*f*) *Sir* Ralph Grey *being taken in* Bamborough-Castle, *for that he had sworn to be true to King* Edward, *was condemned, and had Judgment given upon him by the Earl of* Worcester, *High-Constable of* England, *as followeth.*

(*f*) Stow's *Annals*, p. 418.

Sir Ralph Grey, *for thy Treason the King had ordained, that thou shouldest have had thy Spurs striken off by the hard Heels, by the Hand of the Master-Cook, who is here ready to do, as was promised thee, at the Time that he took off thy Spurs, and said to thee as is accustomed: That and thou be not true to thy Sovereign Lord, he shall smite off thy Spurs with his Knife hard by the Heels; and so shewed him the Master-Cook, ready to do his Office with his Apron and his Knife. Moreover, Sir* Ralph Grey, *the King had ordeyned here, thou mayest see, the Kings of Arms and Heralds, and thine own proper Coat of Arms which they should tear off thy Body; and so shouldest thou as well be disgraded of thy Worship, Nobles, and Arms, as of thy Order of Knighthood. Also here is another Coat of thy Arms reversed, the which thou shouldest have worn on thy Body, going to thy Deathwards; for that belongeth to thee after the Law: Notwithstanding, the Disgrading of Knighthood, and of thine Arms and Nobles the King pardoneth; for thy Noble Grandfather, who suffer'd Trouble for the King's most Noble Predecessors. Now, Sir* Ralph Grey, *this shall be thy Penance: Thou shalt go on thy Feet unto the Towns-end, and there thou shalt be laid down, and drawn to a Scaffold made for thee, and thou shalt have thy Head smitten off, thy Body to be buried in the* Fryars, *thy Head where the King's Pleasure shall be. This Judgment was pronounced at* Doncaster *against the said Sir* Ralph Grey, *for rebelling and keeping of the Castle of* Bamborough *against King* Edward.

Here Mr. *Stow* has given us the *whole and entire Judgment*, which was pronounced by the High Constable

ble against Sir *Ralph Grey*; from whence it is evident, that he was not degraded, neither was his *Doubleness* against *Henry* VI. any Part of the Sentence against him; which (*g*) I take to be a strong Presumption at least, against the Authority of this Case.

We have now done with *Bagot*'s Case; but the Doctor has more Observations in reserve from the *Year-Books*, which he fancies do abundantly support his Cause. His next Instances are from the Grants of *Richard* III. which he tells us were allowed, and never controverted in the Courts of *Henry* VII; and then he proceeds to the Declaration of *Henry* VII.'s Judges, *That the Crown takes away all manner of Defects and Stops in Blood*; of which he seems to be extremely fond; he calls it *Decisive for the Authority of the King in Possession*, and fancies it is impossible to give it a solid Answer. I shall however venture to try the Force of these mighty Arguments in their proper places; and in the mean time shall desire Leave to go through the Reign of King *Edward* IV, before I take Notice of the Doctor's Evidences from that of *Henry* VII.

The last Observation the Doctor pretends to make from the *Year-Books* of this Reign is, (*h*) *That by the Common Law of this Realm Kings* de Facto *are Legislators, or are vested with the Legislative Authority. For* (says he) *in the* Year-Books *of* Edward IV. *the Statutes of the* Lancastrian *Kings are pleaded as Statutes of the Realm, of equal Force and Validity with those made by* Edward IV. *himself.* I answer, this may be true, and yet not sufficient for the Doctor's Purpose; for those Statutes of the *Lancastrian Kings*, which were pleaded and allowed in the Courts of *Edward* IV, were at that very Time *voidable* by that King; and might have been declared of no *Force* or *Validity*, whenever he thought fit; but till such a Declaration was made, the Courts of Justice could not look upon them as actually void. So that their Existence was purely precarious; and they lived wholly by the Permission of *Edward* IV, not by Virtue of any Authority they derived from the *Lancastrian* Kings. And then the Distin-

(*g*) *This Part of the Sentence is also omitted by* Holinshead; *for his Words are*, That Sir *Ralph Grey* was Degraded and Beheaded for his manifest Perjury, for that he had sworn to be true to King *Edward*; *without mentioning any Treason against* Henry VI.

(*h*) *View of the* Engl. *Const.* p. 21.

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ction between Kings *de Facto* and *de Jure* is beyond Contradiction evident; if the Acts of the former are *voidable* by the latter, and not, *vice versâ*, the Acts of Kings *de Jure* voidable by those *de Facto*. I expect indeed it should be said, that all this is affirm'd without Proof; and I confess it is so: But I must intreat the Reader's Patience for a few Pages, and then I shall be at Leisure to give him Satisfaction in this Point.

In the next place the Doctor (*i*) assures us, That not only the Courts of *Edward* IV, but he himself in his *Acts* of Parliament, had own'd the *Lancastrian* Kings to be *Legislators, and their Laws to be of equal Force and Authority with the Laws of any of his Ancestors, or with his own.* And his Way of proving this is as follows: *The* 14*th of* Edward IV, cap. 2. *recites at large a Statute made the* 9*th of* Henry V, *for the Protection of all Persons, that should go with the said King into* France, *or were there in his Service, from being Non-suited at the Assizes*, &c. *whilst they were absent; which Act was to continue till the first Parliament after the King's Return into* England. *After this Recital King* Edward IV. *and his Parliament enact, That the same Order and Protection shall be observ'd, and be as available for all manner of Persons, that should pass into* France *with him, as it was for such Persons, as did pass over the Sea with the said late King* Henry V: *And that all such Persons, as shall now pass over the Sea with our Sovereign Lord the King, shall have and enjoy in every Point, all manner of Advantages, as the said Persons so passing over the Seas with the said late King had by this said Statute. Here we see* (says the Doctor) *that* Edward IV. *declares the Validity of that Statute, during the Time for which it was made, to be equal to this made by himself; and challenges no more Authority for his own Law, than he acknowledges that had.*

(*i*) *View*, p. 31.

This is the only Instance, it seems, he could meet with among *Edward* IV.'s Acts of Parliament; and now the Wonder is, what Service it will do him. *Edward* IV. says, That an Act made by *Henry* V. was *available* to all the Purposes intended by it; which was undoubtedly true; for all those that pass'd over the *Sea* with *Henry* V. did certainly enjoy great Advantages from this Statute. But the Doctor will have it, that *Edward* IV. does in Effect *declare, that Statute was valid during the Time for which it was made*; very right, if he

 means

means only, that it was *de Facto* valid, as it was obeyed; but if he would inferr from it, that therefore *Henry* V. was a King *de Jure*; he must pardon me, if I cannot be of his Opinion; for I cannot easily persuade myself, that *Edward* IV. who treats his Predecessors of the House of *Lancaster* with the odious Name of *Usurpers*; styles them *pretensed Kings*, and would not allow their *Judicial Proceedings* to be good without Confirmation; who declares even their *Acts of Parliament pretensed Acts*, and vacates several of them expresly for Want of Authority in the Makers of them; as will appear fully in the Sequel of this Discourse; and *Lastly*, who in this very Act, we are speaking of, calls *Henry* V. King *de Facto*, and not *de Jure*; could ever intend, the World should believe, he thought that Prince had a *Legislative* Capacity. The Doctor may flatter himself as he pleases, that these are no Contradictions; but I must beg Leave to indulge myself in my Persuasion, that no candid Reader, who seriously examines the Importance of these Expressions, and diligently observes the Style of those Acts, which passed against the Title and Government of the House of *Lancaster*, will allow it to be possible, that the Passage now in question can fairly be understood in the Doctor's Sense. But I need not give myself the Trouble of a nice Examination of every thing he may think proper to say upon this Argument; since all that can possibly be urged, will be effectually answer'd by a View of the Proceedings of *Edward* IV.'s Parliaments; by which it will appear, that all the *Acts* of the Three *Henrys* were held to be defective in Point of Authority: And then certainly those Princes could not have a *Legislative Capacity*, who had none at all.

I SAY, all the *Acts* of the Three *Henrys* were held to be defective *in Point of Authority*, in *Edward* IV.'s Reign. Now their *Acts* were either such, as were *done out of Parliament*, or in it. That those that were done out of Parliament, were not look'd upon as valid, is evident from the *Confirmation* of them by (*k*) *Edward* IV. For why were they confirmed, if they did not need it? If their Authority was not at least questionable, and liable to be disputed without it? The Doctor may here tell us, if he pleases, that a *Confirmation* does not always imply a Want of Authority in that which receives it; because

(*k*) 1 Edw. 4.

because *Magna Charta* was confirm'd several times: But surely that could not be the Meaning of the Parliament in the present Case; for the *Preamble of the Act* assures us, that the *Confirmation* there granted was *in eschewing of Ambiguities, Doubts, and Diversities of Opinions, which might rise, ensue, and be taken of Judicial Acts*, &c. But those Doubts and Ambiguities could only happen upon account of the Power, from whence they proceeded; for upon the *Confirmation* of them it is added, *That they shall be of like Force, Virtue, and Effect, as if they had been done in the Time of any King lawfully reigning*, &c. an undeniable Proof, that it was the Want of Authority in the Prince only, which was the Reason of their *Confirmation*. Besides, we shall find presently, that some of the *Acts* of *Parliament* of the Three *Henrys*, became void purely upon King *Edward*'s refusing to *confirm* them: And then surely it will be granted, that their *Acts* of less Moment and Authority, stood much more in need of a Ratification from the King *de Jure*. And *Lastly*, if the Doctor should insist upon it, that the *Confirmation* given by *Edward* IV. added nothing to the Validity of those *Acts*, for the Benefit of which it was intended; may it not be with as much Reason affirm'd, that the (*l*) *Confirmation* granted to the *Judicial Acts*, &c. of the *Commonwealth* and *Oliver Cromwell*, was equally unnecessary? I shall presume therefore to believe it to be an undoubted Truth, that the *Confirmation* allow'd to the *Acts* of the Three *Henrys* did imply, that they were not of sufficient Authority without it. (*m*) And if this is really the Case, this alone discovers such a Defect of Power in Kings *de Facto*, even tho' their *Acts* of *Parliament* should be allow'd to be good, as will sufficiently vindicate those, who distinguish them from Kings *de Jure*: For if we take a particular View of the several *Extra-Parliamentary Acts*, which only became valid by

(*l*) 12 Car. 2. 12.

(*m*) *For a full and undeniable Proof, that the* Extra-Parliamentary *Acts of the Three* Henrys *became of no Authority upon* Edward IV.*'s Accession to the Crown, the following Passage is very remarkable. Among the* Provisoes *to the Act of Resumption,* 1 Edward IV. *is this that follows.* Rot. Parl. 1 Edw. IV. Provided alway, that this Act extend not, ne in eny wise be prejudicial of eny Grant made by us to *Richard Arthur* Esq; of the Ward of Land and of the Body with the Marriage of *John Kenn* Son and Heir to *Robert Kenn* by our Letters Patents sith the Time of our Reign. And that all Grants made by *Henry* VI. late King in Deed and not of Right, to *James* late Earl of *Wiltshire*, or to eny other Person or Persons, of the said Ward and Marriage, be of such Force and Effect, as they were the first Day of our Noble Reign, and no better.

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the Confirmation of *Edward* IV; we ſhall perceive, that as they were many in Number, and various in their Kinds; ſo they were all Eſſential to the very Being of Government; which cannot poſſibly ſubſiſt, where a Power of performing them is Wanting. Let the Reader only be pleas'd to try the Experiment, and ſee whether he can form any other Idea of a King *de Facto*, from the Statute which confirms the *Judicial Acts*, &c. of the Three *Henrys*, than this which follows.

He is a Perſon that is not legally qualified to give a Commiſſion to *Judges*, neither are the Proceedings in his *Courts of Judicature* (*n*) of any Authority. He cannot (*o*) create a *Nobleman*, or (*p*) make a *Biſhop*; and whatever Liberties, Privileges, and Immunities, *&c.* he grants to *Cities* and *Corporations*, they are of no Validity. His *Licenſes* of *Mortmain*, and *Preſentations* to *Benefices*, are voidable; and even his *Grants of Wards and Marriages*, Fairs and Markets, are revokable at the Will and Pleaſure of the King *de Jure*. He (*q*) can neither give a *Penſion* nor a *Corrody*; and eſpecially all *Lands* beſtowed by him, are reſumable, whenever his *Rightful* Succeſſor is pleaſed to make uſe of his Authority. More Inſtances might be obſerved in the *printed Acts* and *Rolls of Parliament*, beſides what I have here recited; which would abundantly prove, that the Authority of Kings *de Facto*, as aſſerted by the Doctor, was a Secret in our *Conſtitution* not then diſcover'd; for had that been an unconteſted Doctrine, theſe Acts of Kings *de Facto* had never received, nor needed a *Confirmation:* And it will not now be thought ſtrange, if what the (*r*) Doctor had before affirm'd, ſhould be true, *viz. That the Grants, Licenſes, Letters Patent, Gifts*, &c. *of the Three* Henrys, *are pleaded and allowed in all the Judicial Proceedings of* Edward IV.*'s Courts of Judicature to be valid*, &c. for it is plain they were confirm'd by *Edward* IV, and thereby acquired an effectual Force againſt all Oppoſers of their Authority;

(*n*) *My Lord Chief Juſtice* Coke *ſays*, Treaſon lies only againſt a King *de Facto*; *but we find Judgments for Treaſon, given in the Courts of the Kings of the Houſe of* Lancaſter, *confirm'd*, 1 Edw. 4.

(*o*) *It is fit here to obſerve, that though King* Edward, *at the Requeſt of his Commons, did* confirm *all* Titles of Honour, *conferred by the Kings of the Houſe of* Lancaſter; *yet the Record aſſures us* (Rot. Parl. 1 Edw. 4. ſ. A.) *that he did it upon this Condition, that the ſaid Noblemen* ſhould have new Grants from him, of their Annuities for the Suſtentation of their Eſtates.

(*p*) Rot. Parl. 1 Edw. 4.

(*q*) Ibid.

(*r*) *View*, p. 13.

but

but then it must be confess'd, they owed their Validity to that Prince, not to the Three *Henrys*. So that whatever may be the Power of Kings *de Facto* in Parliament, it is clear from the above-mentioned Instances, that they have so little out of it, that the common Ends of Government are not attainable under them.

But the Doctor is confident, the Acts of Parliament of the Three *Henrys* stand upon a sure Foundation; for he (*s*) tells us, *they have been always held valid, though never confirmed*; and therefore (says (*t*) he) *when that which is the highest Act of Government is valid, none of the rest of their Regal Acts can reasonably be disputed.* Upon this Occasion the Doctor will pardon me, if I put him in mind of a (*u*) Complaint he has made against his Adversaries, that they did not duly consider, that all his Arguments are built *upon Matters of Fact, which can only be answer'd by denying them.* Here therefore he plainly transgresses his own Rule, by arguing against *Matter of Fact*; for he very well knew, that *all* the other *Royal Acts of the Three* Henrys were not held to be valid, as the *Confirmation* of them manifestly implied; and this was worse than *disputing* them; for it was putting their Want of Authority out of *Dispute*. Besides, was not their *Authority disputed in* Bagot's *Case*? Was not the *Validity* of *Henry* VI.'s *Letters Patent* the Point, that was chiefly controverted? Certainly this is a Truth the Doctor himself will not dispute; and if I mistake not, it deserves his particular Notice, that this *Dispute* lasted several Terms, and took up at least two Years before it was ended; so *unreasonable* were the Lawyers of those Times, and so ignorant the Judges, of the *Constitution*. Since therefore the Matter is really thus, as I have represented it; since likewise it is a Rule not to be dispensed with in Enquiries after Truth, that doubtful Propositions are to be examin'd by those that are evident and certain, and the contrary is indeed impracticable; why should we not rather inferr, from the *Confirmation*, which we are sure was granted to many of the *Regal Acts* of the Three *Henrys*, that the rest also wanted it; than affirm with the Doctor, (without sufficient Warrant and Authority) that the *Acts of Parliament* of those Kings were held good without *Confirmation*, and therefore that all their other Acts ought to have been esteem'd so too? I am sensible, I am now upon a Point, which deserves well

(*s*) *View*, p. 49.
(*t*) *View*, p. 22.
(*u*) *Preface to his Defence.*

to be consider'd; and I should deceive my Reader's Expectation, if I did not explain myself fully upon it. I say therefore, that the Doctor has (x) affirmed, without sufficient Warrant and Authority, that the Acts of Parliament of the Three *Henrys* were held good without *Confirmation*: And I will presume to add, that he here again violates that Respect, which he professes to be due to *Fact*. For,

First, It evidently appears from some Instances upon (y) Record, that *Confirmation* was denied to some *Acts of Parliament* of the Three *Henrys*; and that the Effect of that Denial was, that they were esteemed of no Authority. Thus, among other Petitions, the Commons pray, *That all Acts of Parliament, afore this Time made, for Payment and Contentation of Fees, Rewards, and Cloathing of your Justices, Barons of your Exchequer, Serjeants at Law, Attorney*, &c. *be good and in Force.* To this the King answers; *As to this Article, it is thought necessary, that they be truly paid; but not to affirm their Assignment of Payment and Contentation by Authority of Parliament; but that it be at the King's Pleasure.* Here we see an *Act of Parliament* loses its Force only for want of *Confirmation*; the bare Denial of which, in that publick Manner, was equivalent to *annulling*, or declaring it *void*. Another Instance is this which follows, and that, I think, not a little remarkable.

ITEM, (z) *Prayen your Commons, that all Acts made by Authority of eny Parliaments, holden in the Time of the pretended Reigns of eny of the said late Pretended Kings, for Contentation or Payment of eny other Sum or Sums of Money, due unto the Mayor and Felawship of Merchants of the Staple of* Caleys, *for the Time being; for Money lent by them to eny of the said late Pretended Kings, or for Payment of Wages of the Captain and Souldiers of the Town of* Caleys, *and the Marches there; be in their Force and Effect, and available to the Felawship and Merchants of the said Staple now being, and to their Successours, for Contentation and Payment of the said Sums of Money yet remaining due and unpaid to them, speci-*

(x) *The Doctor says it again in his Preface to his* Defence; All the Publick Statutes which were made by Kings *de Facto*, have ever had the Force of Laws of this Realm, *&c.* without any Confirmation, or pretended Confirmation; and have been recited as such by Kings *de Jure*, and their Parliaments.

(y) Rot. Parl. 1 Edw. 4.

(z) Ibid.

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fied in eny of the said Acts of Parliament, &c. But the King's Answer was, *This Article is respited*; and if I remember rightly, it (*a*) was not till four Years after, that the *Rolls of Parliament* tells us, there was any Provision made to secure the Payment of those Debts. So that here is a *National Debt*, contracted upon *Parliament Security*, (very probably for the Carrying on a War against *France*, as well as for the Payment of the Garrison of *Calais*) in Danger of being entirely defeated, had not King *Edward* at last, by his *Royal Assent*, entitled it to a Legal Payment. What will the Doctor now say to this? Will he persuade us, that these were no Acts of a publick Nature? Or rather, may we not hope, that he will retract the following Passages, which, it is to be fear'd, have had too much Credit with many of his Readers? *No body*, says the (*b*) Doctor, *has been able to produce one single Act, of all the numerous Acts that were made by the Three Kings of the House of* Lancaster, *that was esteem'd to want the Confirmation of* Edward IV; *for without it they were held to be of as good Authority, as his own Acts.* And again; *I have shewed, that there was not one of the numerous Publick Acts, that were made in the Reigns of the Three* Henrys, *ever confirm'd; and yet stood, and (except such of them as have been repealed) do stand in Force at this Day.* These Expressions are strong and peremptory; and would indeed answer the Doctor's End, if there were any Truth in them; in which respect I must have Leave to say, they are now visibly defective. The Reader will undoubtedly observe, that the Instances I have here recited, of *Acts of Parliament of the Three* Henrys, which became void by being denied a *Confirmation*, are not to be found in the *printed Act of Parliament* of the first of *Edward* IV. And true it is, that they are there omitted, as well as some other Matters, very worthy of Regard in this Controversy; but he will meet with them in the *Rolls* of Parliament, which I presume will be as much to his Satisfaction. And now, though I do not pretend to produce any more Instances of *Acts of Parliament*, which became *void* by being denied *Confirmation*; I would however ask, whether these Two are not sufficient for my Purpose? If they had an original complete Authority before *Edward* IV.'s Time, I would fain know, how they came to need his *Confirmation*. And if they did not need

(*a*) Rot. Parl. 4 Edw. 4. f. 44.

(*b*) *Defence*, p. 70, *and* 86.

need his *Confirmation*, it would be a great Favour to inform me, how they became void by the Refusal of it. With the Reader's Permission, I would carry these Queries a little farther: Did not the Manner of voiding these Acts of Parliament plainly denote a Defect of Authority in those that made them? And might not the same Defect of Authority be objected against every *Act of Parliament* made by the Three *Henrys*, as well as these Two? The Doctor perhaps will ask, how then came any of the *Acts* of those Kings to be good, which do not appear to have been confirmed? But this is a Question I am not bound to answer; it is enough for my Purpose, if I can shew, they were not good without the Approbation of the King *de Jure*; and that I think I have effectually done; and need not be solicitous, from whence they derived their Validity, provided they did not owe it to Kings *de Facto*. The Doctor may gratify his Curiosity, if he pleases, with such Enquiries; but for my part, I have Reason to be contented with the sole Discovery, that the *Confirmation* granted to the Laws of the Three *Henrys* was purely, because they were made by Kings *de Facto*; and none were annulled, or became void, but for the same Reason; for this is as good, as Ten Thousand Arguments, to demonstrate, that the Parliaments of *Edward* IV. did not own the *Legislative Authority* of his Three *Predecessors*; which is the Point now in Question between the Doctor and me. I might urge farther, that if the *Acts* of Parliament of Kings *de Facto*, that were of greatest Moment, were not of Force without the *Confirmation* of the King *de Jure*; then certainly the Invalidity of the rest of their *Acts*, which were of less Consequence, *could not reasonably be disputed*: That is, since it is evident, that the Security given by the Parliaments of the Three *Henrys* for Money borrowed for the Publick Service, (a Matter certainly of the utmost Concern in all Governments) was insufficient; it will follow, that all their other *Acts of Parliament*, could not be esteemed of good Authority.

Secondly, I say again, that it is without sufficient Warrant, that the Doctor affirms, *That all the Acts of Parliament of the Three* Henrys *were good, though not confirm'd*; because it is manifest, some of them were *declared* void; which would not have been done, (according

ding to the constant Practice and Usage of Parliaments) if they had been good; for no *Act* can be *declared* void, but what was defective in some respect before; but no other Defect can be assign'd, as a Reason for such a Declaration, in the present Case, but only that of Authority in the pretended *Legislators*. Now it appears evidently from the *Rolls of Parliament*, (c) that *all Statutes, Acts, and Ordinances, made in and for the Hurt, Destruction, and Avoiding of the Right and Title of King* Richard, *or of his Heirs, to ask, cleyme, or have the Crown Royal, Power, Estate, Dignite, Præeminence, Governance, Exercise, Possessions, and Lordships*, &c. *are ordained, declared, and established to be void, and be taken, holden, and reputed void, and for nought, adnulled, repealed, revoked, and of no Force, Value, or Effect*, &c. For this Clause being *declaratory*, does not only imply, that they were not to be of any Force for the future; but also, that they wanted it before. And this cannot be doubted by those, that will give themselves the Trouble of perusing the whole Act; in which it is affirmed, *That the Right and Title of the Crown of* England, *after the Decease of King* Richard II, *by Law, Custom, and Conscience, descended to* Edmund *Earl of* March; and that *Faith and Ligeance was due to him*; and also *Richard* Duke of *York* is said, *in his Life, to have been very King, in Right, of the Realm of* England. Which Expressions could not possibly have been used, if they had not look'd upon those Acts of *Henry* IV, by which he endeavour'd to secure the Succession of the Crown to his Issue and Family, as ineffectual for the Purposes they were intended. And thus, when *Henry* VI. regain'd the Crown, and by forcing *Edward* IV. out of the Kingdom, was fully possessed of every Part of it; what he did in Parliament, during that Interval, was entirely vacated by the said *Edward*: The Act of Parliament, by which this Annullation was declared, is worthy of the Doctor's serious Consideration; and therefore I shall transcribe it for his Use.

(c) Rot. Parl. 1 Edw. 4.

(d) *Whereas in the most dolorous Absence of our Sovereign Lord the King out of this Realm, being in the Parts of* Holland, *and before his victorious Regress into the same Realm; in a pretensed Parliament, unlawfully and by usurped Power summon'd by the Rebel and Enemy to our Sovereign Lord the King*, Henry VI, *late in Deed and not of Right King of*

(d) 17 Edw. 4. 7.

 England,

England, *holden in the Palace of* Westminster *the Twenty Sixth Day of* November, *in the Ninth Year of our Sovereign Lord the King that now is, under the coloured Title of the said* Henry, *the Forty Ninth Year of the Inchoation of his pretensed Reign, and the First Year of the Readeption of his Usurped Power and Estate, divers and many Matters were treated, communed, wrought, to the Destruction and Disherison of our Sovereign Lord the King, and of his Blood Royal, by the Labour and Exhortation of Persons not fearing* God, *nor willing to be under the Rule of any Earthly Prince, but inclined, of sensual Appetite, to have the whole Governance and Rule of this Realm under their Power and Domination: Which Communication, Treates, and Workyngs, doth remain in Writing, and some exemplified, whereby many Inconveniencies may ensue to our Sovereign Lord the King, and his Blood Royal, which* God *defend, and all Noblemen at this time attending about the King, and all his other Liege People and Subjects, oneles due Remedy be provided in this Behalf. Our said Sovereign Lord the King, by the Assent of the Lords Spiritual and Temporal, and at the Request of the Commons in the said Parliament assembled, and by Authority of the same, for the Surety of his Noble Person, his Noble Issue, and the Inheritable Succession of the same, and for the Surety of all the Lords, Noblemen, and other his Servants and Subjects, hath ordained and established, that the said pretensed Parliament, with all the Continuances and Circumstances depending upon the same, be void and of none Effect. And that all Acts, Statutes, Ordynaunces, Treates, Communications, Conventions, and Workyngs in the said pretensed Parliament treatyed, communed,* &c. *and all Exemplifications made upon the same, or any Part of them, and every of them, shall be reversed, cancelled, void, undone, revoked, repealed, and of no Force nor Effect.*

(e) *View*, p. 37.

The Doctor is indeed *(e)* positive, that the Authority of those *Laws, which* Henry VI. *made on his Readeption of the Regal Dignity, had been own'd, if they had not been repeal'd by* Edward IV. *for these Statutes* (as he is pleased to affirm) *made in the Forty Ninth Year of* Henry VI, *did not sink of themselves, as some have imagined, and urged for an Argument; but were repealed and reversed, as my Lord Chief Justice* Coke *says; for* Edward IV.'*s Act doth not declare them void, but ordain and establish them to be void.* A very

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acute and judicious Obſervation! For then it ſeems (*f*) King *Edward* IV.'s Friends ſtood all this while attainted, his Iſſue excluded the Succeſſion, and his Laws repealed, till the Time of paſſing the Act, which was the Space of eight Years; for ſo long it was, before he thought fit to annull the Proceedings of *Henry* VI. in his *pretenſed Parliament*. Now it muſt be obſerved, that *Edward* IV. held a Parliament in the Twelfth Year of his Reign, and another in the Seventeenth, (when the Act we are now ſpeaking of paſs'd) in which no *attainted* Perſon could poſſibly ſit; and conſequently, during all this Space of Time, the Acts of Parliament made by *Henry* VI, being in full Force, according to the Doctor's Aſſertion, *Edward* IV.'s beſt Friends were incapacitated for Sitting in Parliament: The Doctor may believe this if he pleaſes; but I muſt deſire to be excuſed. The true Reaſon undoubtedly, why at laſt it was thought fit to annull the Proceedings of that Parliament of *Henry* VI, was out of a prudent Regard to the Uncertainty of Humane Affairs, of which that Age was abundantly convinced. Another Revolution might happen, when the Friends to the *Lancaſtrian* Family would have it in their Power to revenge themſelves upon their Enemies; and then thoſe Acts of *Attainder*, which had not been reverſed, might be put in Execution: And beſides, *Henry* VI, in this laſt Parliament, had again entail'd the Succeſſion of the Crown upon his own Iſſue; and (which might be judged a Matter of no ſmall Concern) upon the Failure of it, had ſettled it upon the (*g*) Duke of *Clarence* and his Children. Now conſidering the Temper of that (*h*) Duke, and the Mutability of thoſe Times, it might be thought dangerous to ſuffer that Act (tho' made in a *pretenſed Parliament*, *unlawfully and by uſurped Power ſummon'd by that Rebel and Enemy to King* Edward IV, Henry VI, *late in Deed and not of Right King of* England) to continue *unrepealed*. I make uſe of that Word, becauſe I think I may do it without any Prejudice to my Opinion; for though the Doctor ſeems perſuaded, that whatever Acts are *repealed*, muſt needs be of Force till they are ſo; I cannot allow this to be always true; of which I have juſt now given an Inſtance, in the Acts of *Henry* IV, which were declared Null and Void in the Firſt Parliament of *Edward* IV; and yet in that very

(*f*) Holinſhead's *Chron:* 10 Edw. 4.

(*g*) Ibid.

(*h*) *He died that Year.*

very Statute they are ſaid to be *repealed* too. It is true, the Acts of *Henry* VI. are not *declared void* in this of *Edward* IV, in expreſs Terms; which Omiſſion the Doctor thinks remarkable for his Purpoſe; but the Words made uſe of are certainly of equal Importance; for they are *ordained and eſtabliſhed to be void*, which undoubtedly is equivalent to *declaring* them ſo. In a word, if the Laws made by *Henry* VI. before his Diſpoſſeſſion, were not held of ſufficient Force and Authority, as I have proved by ſome Inſtances; it muſt be very ſtrange, if thoſe made by him upon his Recovery of the Crown, ſhould be good and valid. Or, which is much the ſame thing, if *Edward* IV. could lawfully declare all the Acts of Parliament of *Henry* VI. null and void, which were made by him the firſt Thirty Nine Years of his Reign; it would be ſtrange if any ſhould maintain, that his ſubſequent Laws were of better Authority.

I SHALL now proceed farther in my Enquiries into the Truth of the Doctor's Poſition, *That none of the Acts of Parliament of the Three* Henrys *were confirm'd by* Edward IV. The (*i*) Doctor confeſſes, *that ſome Acts of Parliament relating to the Town of* Shrewsbury, *and to the Founding ſome Religious Houſes, were confirmed by* Edw. IV; but then he ſays, *this was probably through Caution, and at the Deſire of thoſe that were concerned in them:* I readily agree with him in this Point; but the Queſtion is, whether this Caution was not neceſſary; and whether the Validity of theſe Acts, for which this *Confirmation* was deſired, might not have been controverted without it. *Confirmations* of this Nature do not uſe to be deſired, or granted, but upon real, not imaginary Occaſions; and therefore if Conjectures were to be admitted in this Caſe, they ought rather to be in Favour of the former, than the latter; eſpecially conſidering the Intention of the *Act*, in which theſe *Confirmations* were made. The Preamble ſays, it was to *prevent Ambiguities, Doubts, and Diverſities of Opinions about the Validity of Acts of Parliament*; and therefore the Doctor muſt give me Leave to inferr, that this *Confirmation* was no unneceſſary thing. Beſides, allowing this *Caution* to have been *needleſs*, yet even this is an Argument againſt the Doctor's Hypotheſis; for if the *Legiſlative Authority* of Kings *de Facto* was an undeniable Part of the *Conſtitution*, which had been always univer-

(*i*) *View*, p. 49.

ſally

ſally acknowledged, and never diſputed; how came Doubts to ariſe on a ſudden, in Peoples Heads, about the Validity of the Acts of the Three *Henrys*? What Reaſon was there, why any Subject ſhould put himſelf to the Charge and Trouble of ſoliciting an Act of Parliament to ſecure a Title, that had never been called in Queſtion? And this will be thought the more ſtrange, when it is obſerv'd, that tho' the Doctor calls theſe Acts which were confirm'd, *Acts of a Private Nature*; yet they were ſuch, as Multitudes of Perſons were concerned in: All the Inhabitants of the Town of *Shrewsbury*, and all thoſe that derived any Benefit from the *Religious Houſes* founded by the Houſe of *Lancaſter*, whoſe Number could not be ſmall and inconſiderable. Surely it would be very ſurprizing and unaccountable, to find People *ſo much afraid, where no Fear was*, if it had not been a prevailing Opinion in thoſe Times, that the Acts of Kings *de Facto* needed *Confirmation*; but ſuch an Opinion could never have obtain'd ſo powerful an Influence, had the *Conſtitution* been ſuch, as the Doctor repreſents it. To all this let me add, that it was at the Deſire, not only of thoſe that were immediately concern'd, that theſe Acts were *confirm'd*; but alſo of the *Houſe of Commons* too; for all *Acts of Parliament*, in thoſe Days, were in their firſt Formations only Petitions of the *Commons*, who could not be ſuppoſed capable of making that any Part of them, which never had a Precedent to countenance it; and if the Doctor's Opinion be true, wanted even the leaſt Appearance of Reaſon to juſtify and ſupport it. To conclude therefore, ſhould we allow it to be true, that theſe were the only Acts of the Three *Henrys*, that were *confirm'd* by *Edward* IV; yet this *Confirmation* is a Proof, that thoſe *Acts* were not thought of ſufficient Authority without it. And then I may ask the Doctor *to give one ſingle Inſtance out of all our Records, of any Act of Parliament made by a Rightful King, that ever was confirm'd for Want of ſufficient Authority.* This Queſtion was put to the Doctor *with great Aſſurance*, as he is pleas'd to ſay; but I am perſuaded, with as much Judgment: And it is worth while to obſerve, how the (*k*) Doctor anſwers it. *The Acts* (ſays he) *of the* 12*th of* Charles II. *were confirm'd in the* 13*th of* Charles II; *and this*, he tells us, *is an Inſtance for him, and a famous one.* Well! if the Doctor

(*k*) *Defence*, p. 70.

only may ſpeak with *Aſſurance*, who can help it? But I hope, without Breach of Modeſty, we may ask what he meant by this Anſwer; and how it was to his Purpoſe. The Queſtion was, Whether Acts made in a Legal Parliament by a Rightful King, were ever *confirm'd*, by Reaſon of a Defect of that King's Authority: The Doctor ſays, Yes; becauſe King *Charles* II. *confirm'd* the Acts made in the *Convention*; this is wonderful: For the Doctor knows very well, that thoſe Acts were not *confirm'd* for want of Authority in King *Charles* II, when they were made; but for want of Authority in that *Convention*, or *Parliament*, upon the account of its not being called by the *King*'s Writ. The Doctor is too well acquainted with our *Conſtitution*, to be ignorant, that there are certain Eſſential Forms to be obſerved in the *Summoning*, *Electing*, and *Conſtituting* Legal *Parliaments*, by the Omiſſion of which their Proceedings will be queſtionable at leaſt, if not void; and this may undoubtedly (*l*) happen under Kings *de Jure*: But how is this applicable to the Caſe of *Henry* VI, whoſe Acts were *confirm'd* only upon the Account of a Defect in his Authority, and not upon any Suſpicion of Irregularity in the Aſſembing of his Parliament? Well, but the Doctor asks, how it came to paſs, that there were no more Acts of Parliament of the Three *Henrys* confirm'd, if they were not of ſufficient Force without it? I anſwer; That it is very probable, that *many* more were *confirm'd*, than thoſe the Doctor mentions; but that *ſome* more were *confirm'd*, is certain and undeniable.

(*l*) 39 Hen. 6. c. 1.

Firſt, I ſay, it is very probable, that *many* more were *confirm'd*, than thoſe mentioned by the Doctor. For when *Richard* Duke of *York* laid Claim to the Crown, he granted and agreed, that all other *Acts and Ordinances of Parliament* (beſides thoſe that concern'd the Inheritance of the Crown) (*m*) *ſhould be good and ſufficient againſt all other Perſons*: This Conceſſion prevented many Inconveniencies of a Change. And *Edward* IV. was obliged by the Intereſt of his Government, and by this Precedent by his Father, the firſt Claimer, to approve of the Conceſſion. Beſides, the ſame Concern for the Publick Good and Welfare, which prevail'd with King *Edward* to confirm the *Judicial Acts*, &c. of the Three *Henrys*, done out of Parliament, would neceſſarily oblige him to do as much for

(*m*) Rot. Parl. 39 Hen. 6. n. 15.

for many of their *Acts of Parliament*, which manifestly provided for the general Benefit and Advantage of his People. It is true, the *Act* which confirms the *Judicial Proceedings*, &c. of those Princes, seems plainly to (*n*) except their *Acts of Parliament* from that *Confirmation*; but even that Exception overthrows the Doctor's Assertion; for if it was a certain and unquestionable Truth, (as he would make us believe) that those *Acts* wanted no *Confirmation*; it was impertinent to tell the World, it was not intended them: And it is not easy to conceive, such an Instance can be produced of *Acts of Parliament*, the Authority of which was indisputable, that were particularly excepted out of an *Act of Confirmation* for no other Reason, but only because they did not need any. It is very probable therefore, that King *Edward* took care to intimate his Pleasure, that all those *Acts* of his *de Facto* Predecessors, which were thought of publick Use and Service, should still be put in Execution, notwithstanding we do not meet with any express Act of Parliament, by which they were purposely and formally *confirm'd*; and the true Reason, why only those particular Acts, which concern'd the Foundation of *Religious Houses*, and the Town of *Shrewsbury*, were mention'd, seems to have been, rather to secure them from the *Act of Resumption*, which had passed just before in this Session of Parliament, than to supply the Defect of Authority in the Kings of the House of *Lancaster*: For by this *Act of Resumption*, all *Lands*, *Rights*, and *Powers*, being restored to the Crown, which had been granted away by the Three *Henrys*; the very Sites of Religious Houses founded by them were resumable, without a particular Exception; and upon the same Account the Town of *Shrewsbury* stood in need of particular Favour, for the Preservation of those Privileges, which had been conferr'd upon it by the Bounty of those Kings.

(*n*) Stat. 1 Edw. 4. *All Judicial Acts made in any Court or Courts, &c. (other than by Authority of any Parliament holden in any of their Times.)*

But, *Secondly*, It is certain *some* other *Acts of Parliament* of those Princes of the House of *Lancaster*, were confirm'd by *Edward* IV, besides those mentioned by the Doctor: As an (*o*) *Act* for the *Cloathing*, &c. of the *Judges*, (*p*) and the Letters Patent of *Henry* VI. to *Jacquette* of *Luxemburgh*, Duchess of *Bedford*, *granted in Parliament*, are also *confirm'd*. All Commissions of *Sewers*, for which they had the Authority of Acts of Parliament made by *Henry*

(*o*) Rot. Parl. 1 Edw. 4.
(*p*) Ibid.

ry VI, are likewise declared (*q*) Good; which plainly shewed, that those *Acts* were not held of sufficient Force, to warrant the Proceedings of the Commissioners. And *Lastly*, several *Acts of Parliament* made by *Henry* VI. against the *Breakers of Leagues*, &c. with Foreign Princes, are (*r*) expresly *confirm'd*; but at the same time it is declared, that the said *Confirmation* shall not extend to the second of *Henry* V, VI; which affords us another remarkable Instance of an Act of Parliament made by a King *de Facto*, which became void by the King *de Jure*'s bare Refusal to *confirm* it. I doubt not however, but it will be still ask'd, Why don't we find more Acts of Parliament of the Three *Henrys* confirm'd, if it was necessary? How comes it to pass, that so many of their Laws have been executed ever since their Reigns, without any Appearance of a Ratification from their Lawful Successor? If they did not receive their Authority from the Makers of them, from whence did they derive it? Now, if this Objection signifies any thing, it will prove as well, that Laws may be made without Bishops, without a House of Commons, without the Concurrence of the *Three Estates*, and even of the *King* himself; for Instances may be easily given of *Acts and Ordinances*, which have had the Force of Laws in *England*, which were defective upon one or other of those Accounts. Thus Mr. *Prynn* (*s*) tells us, That *several Acts are printed in the Statute Book, as Acts of Parliament, which had no Authority*. And my Lord (*t*) *Ellesmere* has mention'd several *Proclamations*, which had the Force of Laws. It has likewise been (*u*) acknowledg'd, that many *Constitutions*, which were originally enacted by a *Foreign Authority*, (as some *Papal* and *Legantine Constitutions*) are binding in *England*, by Virtue of the *Royal Sufferance*, and the *free Consent of the People*; yet surely it does not from thence follow, that the Pope had any Authority to impose them. But this will appear more evident by the following Observations. (*x*) A Learned Author has assured us, that some Ordinances of

(*q*) 1 Edw. 4. 1.
(*r*) 14 Edw. 4. 4.
(*s*) Prynn's *Pref. to his Register of Parl. Writs in the Beginning.*
(*t*) *In his Speech about the* Post Nati.
(*u*) 25 Hen. 8. c. 21.
(*x*) Præfat. D. Gale ad 15 Scriptores. Mirum dictu, Simon Montfortius leges aliquot rogavit; Henricus tertius pessimis usus consiliis non assensit, inde bellum civile & proscriptiones. Et tamen, quis crederet? Illis ipsis Montfortii nefarii placitis obsequium persolvimus.

Simon

Simon Montfort had as much the Force of Laws, as if they had been made by King *Henry* III. And tho' it is an establish'd Truth, that the Assent of the Commons is absolutely necessary in making Laws, and without it nothing can deserve the Name of an Act of Parliament; yet my Lord Chief Justice (*y*) *Coke* assures us, That the 5th of *Richard* II. concerning Heresy, tho' protested against by the Commons, was put in execution, and continued to be observed as a Law, till it was repealed by *Edward* VI. (*z*) and Queen *Elizabeth*. The same thing is (*a*) affirmed by Mr. *Fox*, of the 2d of *Henry* IV. c. 15. That the Commons never gave their Consent to it; and my Lord Chief Justice (*b*) *Coke* concurrs with him in his Opinion of this Statute, and likewise of the 2d of *Henry* V. c. 7. The Force of which *Acts* was felt by the Subjects, till *Henry* VIII.'s and *Edward* VI.'s Reigns; and afterwards in that of Queen *Mary*, till their final Repeal by Queen *Elizabeth*.

I MAY now ask the Doctor the same Question he puts to his Adversaries, (*Defence*, p. 62.) what sort of Laws these were. Will he say they were *Statute* Laws? That could not be, for they were not enacted in a *Parliamentary* Way. Were they *Common* Laws? That was also impossible at the Time when they were first put in execution. When he answers these Questions, his Adversaries will be able to tell him, what sort of Laws those of the Three *Henrys* were. *Customs*, he says, (*View*, p. 24.) *are sometimes by Acts of Parliament turn'd into Statute Law, but Statutes can never be turn'd into Common Laws or Custom.* But therein he neither speaks Accurately, nor according to Truth: For, *First*, Tho' *Statutes* are sometimes made in Affirmance of *Common Law*; yet *Common Law* is not thereby turn'd into *Statute*; for then it would cease to be *Common Law*. *Secondly*, It is not true, that *Statutes* can never be turn'd into *Common Law*; for my Lord Chief Justice *Hale** has given it under his Hand, *That many of those things, that now obtain as Common Law, had their Original Parliamentary Acts or Constitutions, made in Writing by the King, Lords, and Commons; tho' those Acts are now either*

(*y*) 3d *Inst.* c. *Heresy*; and 4th *Inst.* ch. *H. Court of Parl.* and *Sir* Roger Twisden's *Vind. of the Church of* England.

(*z*) 1 Edw. 6. c. 12. 1 Eliz. c. 1.

(*a*) *Acts and Mon.* p. 586. *in* Hen. 5. and p. 556. *in* Hen. 4.

(*b*) 4th *Inst.* ch. 1. *of the Parliament.*

* *Hist. of the Common Law*, ch. 1. p. 3.

not extant, or if extant, were made before Time of Memory, &c.

I SHALL only beg Leave to mention one Instance more of this Nature, which alone might be sufficient to shew, that the Validity of Laws does not always depend upon the Authority of the first Makers of them; or (that I may express myself with the utmost Clearness) that the Commands of Persons not legally qualified to give them, may be observ'd and obeyed, as equal in Authority to the most Sacred Laws of the Kingdom.

(c) W. Prynn's 4th *Part of a Register*, &c. *of Parliament Writs*. Sect. 5. p. 449, 450, &c.

(c) KING *Richard* II. being forced to yield to the Violence of the Times, issues out his Writs for a Parliament to meet on the 30th of *September*, the 23d Year of his Reign; on which Day he resign'd up his Crown; and the Duke of *Lancaster* took Possession of it, by the Name of King *Henry* IV; and thereby that Parliament was actually *Dissolv'd*, the very first Day it met, as the Parliament Roll of *Henry* IV. declares. (d) *Henry* IV. being thus declared King, does upon that very 30th of *September* issue out his Writs, in his own Name, for a new Parliament, to be held at *Westminster* on St. *Faith* the Virgin's Festival, the 6th of *October* then next following. (e) *Now there being only Six Days Space between the* Teste *of these Writs, and the Day of the Parliament, it was impossible to make any new Elections of Knights, Citizens, and Burgesses, throughout* England, *in so short a Space; upon which Account, the Knights and Burgesses sent to the Parliament summon'd by King* Richard, *were continued, and forthwith return'd for this, as if they had been newly elected, by Virtue of this New King's Writs.* This is Mr. *Prynn*'s Account of this Parliament, which I am persuaded will be found true upon Examination; and if we consider farther, that King *Richard* was a Prisoner at the Time, when he sign'd his Writs for a Parliament, at *Chester*; perhaps there never was a *Convention*, which consisted of Members more illegally assembled. For, *First*, Being not *elected* by their respective Counties and Boroughs, they could not possibly be qualified to represent them. And, *Secondly*, King *Richard* being manifestly under a Force, when he issued out his Writs, by which they were first *Elected*, their Proceedings could never have a just and legal Title to the Name of Laws, unless confirm'd by that Prince, when restored

(d) Prynn, ibid.

(e) Prynn, ibid.

ſtored to his full and entire Liberty. What ſhall we ſay then to the Laws enacted by that *Convention*, by which the Eleventh of *Richard* II. was *confirmed*, and that of the Twenty firſt of his Reign *repeal'd*, and many other *Acts* paſſed, which have hitherto been put in Execution, and are held of Force at this Day? Had they ever been declared good by a ſubſequent Parliament regularly aſſembled, this would be a ſufficient Vindication of their Authority; but where is the *Act* to be found? It is true, in the next Parliament, (*f*) *Henry* IV. *confirms all the good Laws made by himſelf and his Progenitors*; but this *Confirmation* could not be of Force enough, to authorize any *Acts*, which were not good *Laws* before their *Confirmation*; for by the Rules of *Common Law*, the *Confirmation of a void thing is alſo void*: Upon which account (*g*) *Syderfin* tells us, That it was made a Queſtion among the Learned, whether the Acts of the Convention (*A. D.* 1660.) were good, notwithſtanding the Confirmation in the 14 *Car.* II. I confeſs indeed, I ſee no Ground for any Doubt in this laſt Caſe; for the Act of *Confirmation* duly conſider'd, clearly obviates all poſſible Queſtions, and particularly that which he ſtates, of which it is plain the Parliament was aware. For it is obſervable, *Firſt*, They are careful not to call it a Parliament, but only the Lords and Commons aſſembled; and the *Acts*, only *Acts* of the Lords and Commons, conſented to by the King. *Secondly*, They declare, the Aſſembling and Acting in that Manner, is not to be drawn into Example. *Thirdly*, They not only *ratify and confirm*, but *enact and declare* the Acts there mention'd to have *the Force of Laws, as if made in that Parliament*; whereby all imaginable Doubts and Queſtions were effectually prevented, and the Authority of thoſe Acts of the *Convention* beyond Contradiction eſtabliſh'd and ſecur'd. But nothing of this Nature was done by *Henry* IV. in his ſubſequent Parliaments; neither does any thing appear upon Record ſufficient to determine any Controverſy, that ſhould ariſe concerning the Validity of the *Acts* of (what is call'd) his *Firſt Parliament*. From all which Inſtances it is abundantly manifeſt, that the Acts and Orders of Princes and Aſſemblies, which had no *Legiſlative* Capacity, may be obſerved as Laws, though they never had any due *Confirmation*; and then it is alſo evident, that

(*f*) Rot. Parl. 2 Hen. 4. 3.

(*g*) Syderfin's *Reports*, Part 1. Rep. 1.

that the Doctor has not proved his Point; supposing it to be true, *that the Acts of the Three* Henrys *were always executed as good Laws, tho' never confirm'd*; for it will not from thence follow, that their Authority was good and unquestionable.

THUS I have at large laid down the Reasons, why I cannot admit of the *Legislative Authority* of the Three *Henrys*; and particularly suggested some Difficulties, which will not suffer me to allow the Execution of their Acts of Parliament to be a good Argument for their original Validity. In a word, I have offer'd some Proofs, in my Opinion, of Weight enough, to satisfy an unprejudiced Reader, that the Acts of Parliament made by the House of *Lancaster*, were not in themselves of sufficient Force and Authority to oblige King *Edw.* IV; and this I imagine is all, that is needful for my Purpose. For it is a Doctrine laid down by my Lord Chief Justice *Coke*, (*h*) that *Kings that succeed by Hereditary Descent, are bound by the Acts of their Predecessors*; but then they must be supposed to be *Lawful* Predecessors; because no other Reason can possibly be assign'd, why this Rule did not take place in the Case of *Edward* IV, but only the Defect of Title in the Princes of the House of *Lancaster*. From whence we may observe this remarkable Distinction between a King *de Facto*, and a King *de Jure*; viz. That the Acts of Kings *de Jure* do bind their Successors, but those of Kings *de Facto* do not bind Kings *de Jure*; which overthrows effectually (if I may have Leave to speak with Assurance) all the Doctor's Reasonings from the *Acts of Parliament* of the Three *Henrys*. When I say, that *Edward* IV. was not bound by the Laws of the Kings *de Facto* his Predecessors, I would not be supposed to mean, that they were all absolutely *void* at his Acquisition of the Crown: For then it would be hard to conceive, how any of them could be capable of a *Confirmation*, according to the Maxim above-mention'd, *That the Confirmation of a void thing is itself void:* And the Truth is, to be *void*, being the same Thing as to have no Existence; it cannot be pretended, that a *Confirmation* gives a Being to that, which had none before; but only supplies those Defects of Strength and Authority, which it wanted. If I may therefore presume to speak freely on a Subject, which I am by no means qualified to be confi-

(*h*) Calvin's Case.

dent in, I would distinguish between the *Acts of Parliament* of these Three Kings of the House of *Lancaster*; some whereof I would venture to say, were only *voidable* by King *Edward* IV, and the rest actually *void* upon his *Accession to the Crown*. *First*, I am of Opinion, that some (and those the much greater Part) of the Acts of the Three *Henrys*, were only *voidable* by King *Edward* IV, and not actually *void* at his *Entrance upon the Throne*; such I conceive were all those *Acts of Parliament*, which did not in the least prejudice the Right and Interest of the King *de Jure*; and were also conducive to the general Good of the Subject, and the Peace and Happiness of the Government: That these were not actually void in the Beginning of King *Edward*'s Reign, I am very willing to allow; but then they depended entirely upon the Good-Will and Pleasure of *Edward* IV, whether their Authority should be fully establish'd, or utterly rejected: In order to which a (*i*) *Declaratory Act* was manifestly requisite, for the Quiet of the Subject, and the more orderly Proceedings in the Courts of Justice; without which they must have remain'd in the same precarious Condition, during his whole Reign. This I am persuaded is a rational Account of King *Edward*'s Conduct, with respect to the Laws of his Three Predecessors; for though they were good against the Subject, who had already given his Consent to them; yet they could not bind the King against his Will and Approbation, which he might give, or refuse at his own proper Time; and therefore, as I have before observed, though he confirm'd some, and rejected others, yet we meet with an Instance of one, which seem'd to retain some Authority, till the Fourteenth Year of his Reign; which clearly proves, that all that while their Obligation was not fix'd and determin'd; as not being completely *valid* without a *Confirmation*, nor *void* without a *Declaratory Act*. So that these Acts of Parliament of the Three *Henrys*, remaining still upon Record, were executed by the Courts of Justice, and Officers of the Kingdom, without any Opposition or Interruption from the King;

(*i*) *It was agreed* (*in* Calvin's *Case*) *that though Conquerors are not bound by the Laws of the Country, which they conquer; yet in all Conquests of Christians against Christians, the Laws of those Countrys will remain in Force, without a Declaration to the contrary.*

and therefore were of Force only by his *Permission*, not by the Authority of the Kings of the House of *Lancaster*. In a word, as it is (*k*) declared by Act of Parliament, that though the Pope had no Authority of impose his Decrees upon this Kingdom, yet many of them, for a long while, obtained the Force of Laws by *Royal Sufferance*, and *the free Consent of the Subjects*; the same thing may be said of the Laws of the Three *Henrys*: They were of no Authority by Virtue of any *Legislative Capacity* in the Makers of them; but being of Publick Use and Service, by the *Sufferance* of *Edward* IV, and his Successors, and the Approbation of the People, they have been constantly received and executed, as if they were made by Princes of an undoubted Title. And for a farther Proof, that this is no singular and unwarrantable Opinion, which I have here advanced, the following Instance will deserve the Reader's Perusal. King *Henry* VIII. having great Occasion for Money, which he was ashamed to ask for in Parliament, (their late Bounty to him having more than answered all his just Expectations) appoints Commissioners to collect a (*l*) *Benevolence* throughout his Kingdom: Now this being directly contrary to an Act of Parliament, made by (*m*) *Richard* III. that Statute was objected by one of the City Lawyers, against any farther Proceedings in that Collection; but it was answer'd immediately by the King's Counsel, (*n*) *That Laws made by Usurpers oblige not Legitimate Princes. That* Richard III. *was not only a Tyrant, but a Murderer of his own Nephews*, &c. *That* Henry VIII. *being the True and Undoubted Heir of the Crown, could be tied thereby no farther, than it pleased himself; it being absurd to think, that a Statute invented by a factious Assembly, and approved no otherwise, than by a Criminal in the highest Degree, should bind an Absolute and Lawful Monarch; wherefore if they had no better Evasion, it was not fit to maintain this.* Such was the Opinion in that Reign of the Laws of Kings *de*

(*k*) 25 Hen. 8. 21.

(*l*) *Lord* Herbert's *Life of* Hen. 8. Anno 1525. *See also Sir* Robert Cotton's *Posthuma*. Of the manner how Kings have supported themselves, *pag.* 177. *where we meet with the following Passage*: In the Time of *Hen.* 8. *Anno* 14. of his Reign, he exacteth by way of Loan, Ten Pound in the Hundred of all Goods, Jewels, Utensils, and Land, and according to the extremest Rate revealed by Oath of the Possessors. Notwithstanding there is a Law, 1 *Richard* 3, that none shall be denied, in Demand of any Loan, his reasonable Excuse.

(*m*) 1 Rich. 3. 2.

(*n*) *Lord* Herbert, ibid.

Facto;

Facto; and the Consequence of it was, that the King proceeded in collecting the *Benevolence*, without any Regard to *Richard* III.'s Statute. This Piece of History I am persuaded is very pertinent to my Purpose, and a clear Proof, that I have very good Authority for my Opinion, that the Laws of Kings *de Facto* do not bind Kings *de Jure*, and are only of Force by their *Permission and Sufferance*; and thus I leave it to the Doctor's Consideration. To conclude therefore, the Distinction between a King *de Facto*, and a King *de Jure*, is hereby sufficiently evident, that the latter can declare the other's Acts null and void, at his Pleasure; but the former has no manner of Authority over the Acts of a King *de Jure*. And this is agreeable to the unanimous Opinion of all the Judges, which they deliver'd in a Question about the Grants of King *Edward* IV, (*o*) in which they affirm, *that they are all good without any Confirmation*, which cannot be said reciprocally of the Acts of Kings *de Facto*.

But, *Secondly*, Though many of the Acts of Parliament of the Three *Henrys*, may very reasonably be allow'd to be only *voidable* by the King *de Jure*; yet there were some of a different Nature, which were undoubtedly *void* upon King *Edward*'s Accession to the Crown; and such were all those, which were made against the *Title, Person, and Interest of that King, and his Family*. The Doctor allows it to be true, that the bare *Possession* of the Crown *voids* all *Attainders*; and certainly the Reason is the same for the Nullity of all other *Acts* against the Right and Dignity of the True Heir, when he has gained his Inheritance; and therefore I shall presume to say, that those *Acts* of the House of *Lancaster*, which limited the Succession of the Crown to their own Family, would have been of no Validity, though *Edward* IV. had never annulled them by the Authority of Parliament. If it should be asked, why then they were declared *void*, if they were *void* without such a Declaration; I answer, That Princes have always thought this necessary, for the greater Security of themselves and Adherents, lest ano-

(*o*) *Year-Books*, 1 Rich. 3. 3. Term. Mich. Nota. Tenuz per touts les Justices, que touts les Grants fait per Edward le 4. à ascun homme d'ascun Office, nient Judic⁻, comme Parkership & hujusmodi, ou Annuité grant à terme de vie, le grant est bon sans ascun confirmation; autre est des Offices Judic⁻, car ceux sont voydes, &c.

ther

ther Revolution ſhould put their Enemies again in Poſſeſſion of the Throne; and then all the *Acts* made by them, which had not been vacated, would appear in Judgment againſt them, to their utter Ruin and Deſtruction.

THUS, in the Caſe of *Henry* VII, though the Judges had given their Opinion, *that the Crown took away all Stops and Defects of Blood, yet that* (p) *Prince took Care to have it ordain'd in Parliament, that all Records, wherein there was any Memory or Mention of his Attainder, ſhould be defaced, cancelled, and taken off the File.* Thus *Edward* IV. *voided* all thoſe Laws, that had been made to the *Diſherinſon* of the Houſe of *York*; and *Henry* VI, upon his Recovery of the Crown, annull'd thoſe of *Edward* IV. againſt his Title. And laſtly, in the like manner did *Edward* IV, ſome Time after his Reſtauration, treat the whole Parliament of *Henry* VI. But from theſe Inſtances it cannot fairly be inferred, that thoſe Princes thought theſe *Acts* had Authority, without ſuch an Annullation; for we find, that ſometimes the *Acts* of the moſt impudent Rebels, and vileſt Uſurpers, have had the Honour of being declared *void* in Parliament, though no body doubted of their being ſo without ſuch a *Declaration.* Thus the *Acts of* John Cade, *a moſt abominable Tyran, horrible, odious, and errant fals Traytour, and all Enditement, and all things depending thereof, had and made under the Power of his Tyranny and Rebellion, are* (q) *declared of no Record, nor Effect, but void in Law.* And all (r) *Attainders by* Oliver *and the ſucceeding uſurped Powers, and* (s) *all Orders, Ordinances of both Houſes, or either Houſe of Parliament, for impoſing Oaths, Covenants, or Engagements, levying of Taxes,* &c. *are declared void*; though in the ſame *Act* it is ſaid, *They were all null and void in their firſt Creation, and Making.*

(p) *Lord* Bacon's *Life of* Hen. 7. Engl. *Edit. Fol.* p. 13.

(q) 31 H. 6. c. 1.

(r) 12 Car. 2. 12.

(s) 13 Car. 2. 1.

I HAVE now examined every thing, which appear'd to me conſiderable in the Doctor's Plea for the *Legiſlative* Power of the Three *Henrys*; and if I do not judge too indulgently of my Performance, have ſhew'd it to be defective in the ſeveral Points, which were moſt inſiſted on. At the ſame Time I imagine, I have made it evident, that the Example of *Edward* IV. is a clear Proof of the true Authority of Kings *de Jure*, in Oppoſition to the pretended Authority of Kings *de Facto.*

In the next place the Doctor urges the Laws of *Richard* III. as a good Argument for his Legislative Capacity; and several Pages are spent, to convince us, that all his Acts of Parliament have been constantly executed, as equal to those of the most undoubted Authority; excepting only such, as were *repealed* by *Henry* VII; for that King (*says* (t) *he*) did not pretend to declare any of them *void*; which he certainly *would have done, if the Constitution would have borne it, since some of the Acts of* Richard III. *were of that odious and detestable Nature, and his Person so justly abhorred, that it was doing him too much Honour to repeal those Acts, if they could have been set aside for Want of Authority in the Maker of them.* To this purpose does the Doctor argue: And I very readily agree with him; I allow it to be true in Fact, that *Henry* VII. did not declare any Law of *Richard* III. *void*; and I am entirely of his Opinion, *that the Constitution would not bear it*; nay I am willing to grant, that this was a good Proof of the *Legislative* Authority of *Richard* III, with respect to *Henry* VII; and fully demonstrated, that the Laws of the former did bind the latter. But then I must beg Leave to dissent from the Doctor, when he inferrs from it in general, that the Laws of Kings *de Facto* are, in their own Nature, and without any Exception, good and valid. For, had *Henry* VII. as true an *Hereditary Right*, as he pretended, we should have met with a much different Account of his Proceedings on Record, from what we now find; but being himself in Reality no other than a King *de Facto*, it was impossible for him to act otherwise, than he did. How could he declare the *Acts* of his Predecessor *void*, upon the Account of his being an *Usurper*, when he knew, he was no better himself? Could his Laws be esteemed of greater Authority than *Richard* III.'s? And what a happy Discovery would it have been to his Subjects, to acquaint them, that whatever Laws he imposed upon them, they could not oblige his Successor; and consequently would have but a precarious Existence after his Demise? So that *Richard* III, considered with regard to *Henry* VII, was a King *de Jure*; as every King *de Facto* is to his Successor, who has no better Title; for whatever Laws are made by the one, will bind the other: And this undoubtedly is the true Reason, why *Henry* VII. repealed those Laws of *Ri-*

(t) *View*, p. 44.

chard III. which he had a mind to get rid of; it being otherwise impossible to destroy their Authority. And nothing can be a more remarkable Proof for this Purpose, than an Instance, which, the Doctor fancied, did very much favour his *Hypothesis*; and that is in the Case of those, who had been attainted by *Richard* III; who were not permitted to sit in Parliament, till their *Attainders* were reversed by a particular *Act* for that purpose; but had *Henry* VII. been King *de Jure*, he would not have been obliged to those Formalities; for it may be remembred, what I before observed, that *Edward* IV. did not reverse those *Acts of Attainder* made by *Henry* VI. against his Adherents, till above seven (*u*) Years after his Restauration; in which Space of Time he had held several Parliaments, wherein those Lords and Gentlemen must have sat, before the Reversal of their *Attainders*; unless the Doctor can imagine, so great a Number of Persons, remarkable as well for their Quality and Fortunes, as for their Fidelity to their Prince, were all that while incapacitated to sit in Parliament. Thus it is evident, that the *Acts* of *Richard* III. were only valid against *Henry* VII, who having no better Title than *Richard*, could not pretend to declare them *void*, without bringing all his own *Acts* into question. If it should be now asked, how those of *Henry* VII. continued in Force, considering that he was succeeded by a Prince, that had an undoubted Right, not a bare King *de Facto*; the Answer is obvious; for this King of an undoubted Right was *Henry* VIII. his Son, who had too much Respect and Honour for his Father, to set a publick Mark on him as an Usurper, by annulling his *Acts*; and for this Reason it is, that the *Acts* of *Richard* III, as well as those of *Henry* VII, have always continued in Force; because *Henry* VIII, who had Authority enough to vacate them, and did vacate the *Act* against *Loans*, yet thought fit to permit them to be executed during his Reign; especially considering, there was nothing in them to the real Prejudice of the Crown; but on the contrary, they were generally of great Use and Service in promoting the Interest of his Government; and having been thus put in Execution through *Henry* VIII.'s Reign, none of his Successors would afterwards give themselves the Trouble of calling their Authority in question. This I take to be a reasonable and true Account

(*u*) Edward IV. *recover'd Possession again in the 9th Year of his Reign, and the Act for Reversing the* Attainders *did not pass till the 17th.*

count of the present Validity of those *Acts*; and no other, I believe, can possibly be given, which is consistent with the Power exercised by *Edward* IV, and *Henry* VIII, which belongs as well to every King *de Jure*, as it did to them.

When I call *Henry* VII. King *de Facto*, I therein rather comply with the Humour and Inclinations of that Prince, than my own real Sentiments: For (*x*) from the Time of his Marriage with the Heiress of the House of *York*, he undoubtedly became King *de Jure*; and even before that Time, from the very Entrance of his Reign, he may be look'd upon as having a *Presumptive Right* to the Allegiance of the People of *England*, as he had obliged himself by an early Promise to marry that Princess, and the whole Nation was persuaded he would not fail to perform it. For (*y*) before he invaded King *Richard*, he had passed his Word, that he would make that Princess his Wife; which gave the greatest Encouragement to the Nobility, who considered the true Interest of their Country, when they assisted him in that great Enterprize: And in his first Parliament, the Commons did not forget to Address him to the same Purpose; *and* (*z*) *the Lords Spiritual and Temporal, rising from their Seats, and standing before the King, as he sat upon his Royal Throne, with their Heads bowed, in a low Voice humbly Requested him, to make the Lady* Elizabeth *his Queen.* To whom he (*a*) answer'd, *with his own Mouth, That he was content to proceed according to their Desires and Requests.* So that the People of *England*, from the first Commencement of his Reign, had reason to consider him as the *Husband* of the *Right Heir* to the Crown; and upon that Account their Obedience and Fidelity to him will admit of a fair Excuse and Justification. But *Henry* VII. esteem'd it a Diminution to him, to owe his Title to his Lady; and therefore, as if he was afraid of nothing so much, as being thought a *Lawful Prince*, he chose to found his Claim on his own *Hereditary Right*, his Victory, and the *Pope*'s Confirmation; which were utterly incapable of affording him any real Support and Defence. His *Hereditary*

(*x*) *Archbishop* Parker *speaking of the* Pope's *Bull, in which several Titles are bestowed on* Henry VII. *adds*, Solum Jus Divinum omisit, cujus etsi Ipse expers fuit, tamen illæ cœlitùs datæ nuptiæ carere non potuerunt. Antiq. Britan. in vitâ J. Morton. p. 297. Edit. Hanov.

(*y*) *Lord* Bacon's *Life of* Hen. VII. p. 2.

(*z*) Rot. Parl. 1 Hen. 7.

(*a*) Rot. Parl. ibid.

Title

Title has indeed been much talked of, and often taken for granted even by (*b*) Persons of Note and Eminency; and therefore it may be worth while, to give that Matter a thorough Examination.

It has been surmised, that *Henry* VII. had a Title to the Crown, as being descended from *John of Gaunt*, Duke of *Lancaster*; and tho' it be true, that the Pretensions of the House of *Lancaster* were condemned as *false and groundless* in the first Parliament of *Edward* IV; yet it is urged, that (*c*) *Henry* VII. having repealed that Act of *Edward* IV, by which *Henry* VI. his Queen and Son were attainted and disabled; all the Judgments made against that Family were consequently annulled, and their Right revived. But these Assertions will soon appear to be Mistakes.

First, It is pretended, that *Henry* VII. had an Hereditary Title, as being descended from *John of Gaunt*; and the Truth is, we find it in the (*d*) Record of Parliament, that the *King* [viz. *Henry* VII.] *told the Commons with his own Mouth, that his Coming to the Crown was as well by a Just Title of Inheritance, as by the True Judgment of* God, *&c.* and in one of the (*e*) printed Statutes it is said, his Coming into *England* was *for the recovering and obtaining his Just Title and Right to this his Realm of* England. So that it seems his Right and Title commenced antecedently to his Possession of the Crown, and before any of the Laws of *Edward* IV. which had set aside the Title of the House of *Lancaster*, were repealed. But surely the *Beaufort* Family, from whence only he derived his Descent by his Mother, were the *Illegitimate Issue* of *John of Gaunt*, and *Katharine Swinford*, being born before Marriage, and consequently, by the Laws of *England*, incapable of claiming any Rights by Inheritance. They were indeed afterwards *legitimated* by (*f*) Act of Parliament; and rendred capable of every thing, but the *Succession to the Crown*; from which they were *excluded*

(*b*) *My Lord* Bacon *himself has countenanced this Opinion in his History; and the Bishop of* Sarum (Hist. Ref. Part 1. B.) *thinks, the only Objection against* Henry VII.*'s Title was his Mother's being alive, from whom he derived it. And Dr.* Higden *has declared himself of the same Sentiments.* View, p. 66. *And* Defence, p. 165.

(*c*) Rot. Parl. 1 Hen. 7.

(*d*) Rot. Parl. 1 Hen. 7. D. Rex præfatis Communibus ore suo proprio eloquens, ostendit suum Adventum ad Jus & Coronam Angliæ fore tam per justum *Titulum Hereditarium*, quàm per verum Dei judicium, &c.

(*e*) 1 Hen. 7. 6.

(*f*) Rot. Parl. 20 Ric. 2.

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by expreſs Words in that Statute, as my Lord Chief Juſtice (g) *Coke* obſerves; and therefore it is impoſſible to conceive, how *Henry* VII. could, with any Colour of Juſtice, lay Claim to the Crown of *England* by *Deſcent*.

(g) *See Lord Chief Juſtice* Coke's *4th* Inſtitut. c. 1. *of the Parliament; and the whole Act in the* Appendix, N. 4.

But, *Secondly*, It is pretended, that all thoſe Acts of *Edward* IV. which deſtroyed the Title of the Houſe of *Lancaſter*, were repealed in the firſt Year of *Henry* VII. Thus Sir *George Treby* (h) ſays, *That in the Firſt of* Henry VII, *there is an Act made, that ſets aſide all the Acts and Attainders made againſt his Line, and conſequently repealed* 1 Edward IV, *which repealed* 1 Henry IV. And ſo far (i) Dr. *Higden* agrees with him, as to affirm, *That* Edward IV.'*s Attainders of* Henry VI. *were revers'd and annull'd, and* Henry VI.'*s Title reſtored by Act of Parliament, in the firſt Parliament of* Henry VII: And again, (k) *Henry* VII. *in the firſt Year of his Reign, paſs'd an Act of Parliament, wherein it is enacted, That all Acts of Attainder or Diſablements againſt the late King* Henry VI. *be void, annull'd, and repealed*, &c. *So that the Force of all the former Declarations and Acts of Parliament againſt* Henry VI. *is taken off by this laſt Act of Parliament, which reſtores his Title.* Now the Truth of this Matter will beſt appear by a Sight of the Act itſelf, which I ſhall here ſet down out of the Record. 1 *Hen.* 7. *The King our Sovereign Lord remembring, how againſt Righteouſneſs, Honour, Nature, and Duty, an inordinate, ſeditious, and ſlanderous Act was made againſt the moſt famous Prince of Bleſſed Memory, King* Henry VI, *his Uncle, in Parliament, in the firſt Year of* Edward IV. *late King of* England; *Whereby his ſaid Uncle, contrary to due Allegiance, and all due Order, was attainted of High Treaſon. Wherefore our Sovereign Lord*, &c. *ordained, that the ſaid Act, and all Acts of Attainder, Forfeiture, and Diſablement, made or had in the ſame Parliament, be Void, Annull'd, and Repealed, and of no Force, or Effect.* From whence it is evident, that by this Repeal only thoſe particular Acts, or rather Clauſes of Acts, were abrogated, whereby the *Heirs of* (l) Henry *Earl of* Derby *were declared evermore unabled, and unworthy to have, joy, occupy, hold, or inherit any Eſtate, Dignite, Pre-eminence, Enheritements, or Poſſeſſions within the Realm of* England, *&c.* All the other Judgments of Parliament, for the Title of *Edward* IV,

(h) *Debate at the Conference concerning the* Abdication, p. 50.

(i) *View*, p. 36.

(k) *View*, p. 58.

(l) Rot. Parl. 1 Edw. 4.

and against that of the House of *Lancaster*, still remaining unrepealed, and in full Force. The utmost therefore, that can be collected from this Statute of *Henry* VII. is no more than this; That those Incapacities, which arose from Corruption of Blood, and Forfeiture, were now removed from *Henry* VI. and his Heirs: But that was not sufficient to restore his Title to the Crown; the (*m*) *Act of Parliament*, on which it depended, having been annull'd by *Edward* IV, and never again revived. And indeed there was no imaginable Reason, why *Henry* VII. should attempt to restore *the Title of the House of* Lancaster; since it could not possibly help him to any Pretence of Right, as I have already proved; and would be prejudicial to the Claim of the House of *York*, the firmest Support of his Throne, upon which only he could rely.

But though *Henry* VII. were no more than a King *de Facto* before his Marriage, I am willing to consider him under a much different Character afterwards, when he became the Husband of the undoubted Heir to the Crown. In which Case, though the Queen alone was Legally entitled to the Executive Power; yet the most scrupulous Subject had no Reason to think her injur'd, when it was exercised by her Husband; on whom, it might very justly be presumed, she had freely devolv'd all her Right, and Authority. In this respect therefore the Title of *Henry* VII. could not well be disputed; since in Judging of the Rights of Princes, nothing more is necessary, than to be assur'd, that Allegiance may be paid to them, without doing any Wrong to a third Person; by which Rule the Authority of *Henry* VII. became unquestionable; and without the least Doubt or Scruple he might very honestly be acknowledged as King *de Jure* So that from the Time of his Marriage, we are to look

(*m*) *The Entail of the Crown made by* Henry 4, (7 Hen. 4. 2.) *on his Issue, was declared null and void by* Edward 4. (Rot. Parl. 1 Edw. 4.) *in the following Words:* Be it ordained, declared, and establish'd, that all Statutes, Acts, and Ordinances heretofore made, in and for the Hurt, Destruction, and Avoiding of the Right and Title of King *Richard*, or of his Heirs, to ask, claim, or have the Crown Royal, Power, Estate, Dignite, Preeminence, Governance, Exercise, Possessions, and Lordships abovesaid, be void, and be taken, holden, and reputed vid, and for nought, adnulled, repealed, revoked, and of no Force, Value, or Effect. *Which Act of Annullation made by* Edward 4, *was never repealed by* Henry 7.

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upon him as perfectly endued with a Legiſlative Capacity, which ſecures all his ſubſequent Laws from the Objection, to which thoſe made in the Beginning of his Reign were liable.

FROM theſe Obſervations and Remarks on the Title of *Henry* VII, I proceed to the Conſideration of that (*n*) Statute of his, which has been often cited, as the ſureſt Support of the Authority of Kings *de Facto*; and is ſtill relied upon, as the ſafeſt Retreat, when all other Arguments fail: But if the (*o*) *Authority of Kings* de Facto *had been always acknowledged; and the Allegiance, which this Statute declares to be due to them, was ever paid in this Realm; and both the one and the other juſtified by the Common and Statute Law of the Kingdom, in the Reigns of Hereditary Kings*; why could not *Henry* VII. be contented with the Proviſion already made for the Protection of his Adherents? What Occaſion was there for a new Law to eſtabliſh a Privilege, which had been long a known Part of the *Conſtitution*, and the Birth-right of every *Engliſh* Subject? And it is apt to increaſe one's Wonder, to ſee my Lord *Bacon*'s Authority (*p*) alledged, to ſhew the *Wiſdom, Juſtice, and Magnanimity* of this Statute; for where was the *Wiſdom*, to do a Thing that was unneceſſary? The *Juſtice*, to give what no-body had Reaſon to demand? Or the *Magnanimity*, to defend thoſe, who were in no manner of Danger? But it may be, theſe are nice and frivolous Queſtions; and therefore I haſten to a ſtrict Enquiry into the true Meaning of this Statute; and that certainly may be beſt collected from the (*q*) Condition and Circumſtances of the Law-giver, and the End for which this Statute was intended. If we conſider the Condition and Circumſtances of *Henry* VII, at the Making of this Statute, it is plain, as I have already ſhewed, he was a King *de Jure*, as well as *de Facto*; and the (*r*) Doctor, to do him Juſtice, is very willing, it ſhould

(*n*) 11 Hen. 7. 1.

(*o*) *Dr.* Higden's *View*, p. 64. *He ſays, This Act has lain under a great Prejudice, as if it introduced a* new Authority, *and a* new Allegiance, *not known before in our Conſtitution*, &c. p. 64.

(*p*) *Defence*, p. 125.

(*q*) *It is a good Rule for the Underſtanding of Statutes, to know what were the Miſchiefs and Grievances in the Kingdom, which the Parliament meant to remedy: For, as it is obſerved in the* Inſtitutes, *many Records of Parliament can hardly be underſtood, unleſs you join thereunto the Hiſtory of the Times. See* the Juriſdiction of Chancery vindicated, *at the End of the* Reports of Caſes in Chancery, *p.* 70.

(*r*) *View*, p. 65, 66. *Defence*, p. 128.

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be admitted, that he was so. And indeed, whoever impartially examines the Circumstances of those Times, will easily be satisfied, that it was impossible for *Henry* VII. to be invaded, or dispossessed of the Throne by any Person, that had so good a Right as himself; so that he had no body to fear, but an unjust *Pretender*; and was only in Danger from those, that had no Legal Claim to the Crown: He had no Reason therefore to be particularly concern'd for the Safety of his Friends, as a King *de Facto*; for he knew, he was *de Jure* too, with respect to any one, that should oppose him; and surely (how equitable soever such an Act might be in some respects) he could never be moved to it from a just, and wise Calculation of any real Advantage, that would accrue to him from it; but had Reason rather to apprehend the contrary: For, considering the Posture of Affairs at that Time, that he was daily threatned with a powerful Invasion, which for ought he knew might succeed; he might easily foresee, that his Enemies then would reap the greatest Benefit from this Act: For had *Henry* VII. lost a Battle, and been driven from his Throne, the People would have been bound, by Virtue of this Act, in the Sense now put upon it, to have defended the Usurper against him; and could never have been punished for so doing. Whatever therefore might have been the real Design of this Law, it could not certainly be the primary and chief Intention of it, to support the Thrones of ambitious Intruders, by what Means soever they succeeded in their bold and daring Enterprizes: Such a Law as this, was so apparently dangerous to *Henry* VII, that it cannot well be imagined to have been ever in his Thoughts. And there is this farther Prejudice against the Doctor's Opinion, that this Statute (if intended wholly for the Advantage of Kings *de Facto*) would have occasion'd the severest Censure imaginable upon *Henry* VII.'s Reign; for if (*s*) *it was against all Law, Reason, and good Conscience, that Subjects going into Wars with Kings* de Facto, *should lose or forfeit for doing this their Duty of Allegiance*; the Doctor will find it a very difficult Matter to discover, upon what Principles of Justice so many Persons were attainted, for no other Reason, but for being in the Service of *Richard* III. The Doctor may easily satisfy

(*s*) *The Words of the Act*, 11 Hen. 7. 1.

tisfy himself in this Matter from the (*t*) Rolls of Parliament, where he will find (*u*) many Persons of Note attainted, purely for following the Fortune of that King, and assisting him in the Battle of *Bosworth-Field*; and it deserves the Doctor's particular Reflexion, that at the very Time, when this *Just* and *Merciful* Act (for so I find it is esteem'd) was passed, several of those Gentlemen continued still under *Attainder*, as appears from the Records of the 11th and 12th Years of *Henry* VII. It must be confessed, the Doctor has been pleas'd to take Notice of this Objection; but then he has given it such an Answer, as I have too much Respect for him, to call by its proper Name. *It is objected* (says he) *that these Princes sometimes attainted some of the Leaders of the Opposite Party for adhering to their Rivals. But when they did this, their constant Way of Proceeding against such Persons, was by Attainders in Parliament* ex post Facto, *and not by Indictments in the ordinary Course of Proceedings; which shews, I think, at the same time, that to serve the King in Possession was not a Fault, nor could be punished as such by the Laws that were then in Force.* Now, if I might do it without Impertinence, I would ask the Doctor the Meaning of *Attainders* in Parliament *ex post Facto*; for surely none were heard of *ante Factum*. Laws indeed have been sometimes made *ex post Facto*, whereby Actions have been subjected to Punishment, which were not Criminal when they were committed: But the Doctor knows very well, this is not the present Case; for it cannot be affirmed, that any new Laws were made in *Edward* IV.'s and *Henry* VII.'s Reigns, which made People *Traytors*, who might not have been condemn'd as such, by Laws before in Being. That many were judg'd guilty of Treason, and attainted upon that Account in their Parliaments, is very certain; but we are to presume, those Proceedings were founded upon a Law already made: For my Lord Chief Justice (*x*) *Coke* tells us, *That by Order of Law*

(*t*) *The Names of those attainted at that Time were these that follow:* John *Duke of* Norfolk, Thomas *Earl of* Surrey, Francis Lovell, Walter Devereux, *Lord* Ferrers, John *Lord* Zouche, Robert Harrington, Richard Charleton, Richard Radcliffe, William Berkly *of* Wely, Robert Brackenbury, Thomas Pilkington, Robert Middleton, James Harrington *Knt.* Walter Hopton, William Catesby, Roger Wake, William Sapcott, Humphrey Stafford, William Clerk *of* Wenlock, Jeffrey St. Germain, Richard Watkins, *with several others.*

(*u*) *View*, p. 47.

(*x*) Inst. 4. ch. 1. p. 39.

a Man cannot be attainted of High-Treason, unless the Offence be in Law High-Treason; and therefore he ought not to be attainted by general Words of High-Treason, by Authority of Parliament. He owns indeed, that this had sometimes been done; but then he does not pretend to give any other Instances of it, besides the Case of *Elizabeth Barton*, and Lord *Cromwell*, in *Henry* VIII.'s Time. So that it were to be wish'd, the Doctor had been less forward in affirming, that the *Attainders* in Parliament were occasion'd, for Want of Law to punish Persons out of Parliament; for their *Attainders* suppos'd them to be *Criminal*, but did not make them so; and therefore they might have been tryed, and condemn'd in the *Ordinary Courts of Justice*, had it been thought necessary. The Truth is, it is a vain Imagination of the Doctor's, that the Reason of *Attainders* in Parliament was, because such Persons could not be proceeded against by Indictments; the contrary being easily demonstrated by Multitudes of Instances, which would abundantly shew, that the true Cause of giving Judgment in these Cases in Parliament, was rather for the sake of Expedition, upon the Account of the Number of Criminals, and to prevent unnecessary Delays, especially when the Facts, which were the Reasons of those *Attainders*, were Notorious; and therefore there was no occasion for those tedious Methods of Proof, which are used in the inferiour Courts of Justice.

But I return now to *Henry* VII.'s Statute, which could not be intended purely for the Benefit of Kings *de Facto*, for the Reasons I have now given; but that the Safety and Interest of that Prince's Friends and Adherents were consulted by it, can never be doubted; for by Virtue of it, they had been effectually protected, tho' *Henry* VII. had lost his Throne. And this I think will appear from the following Considerations, which will much contribute to the deciding our present Controversy. *First*, That all Laws made by Kings *de Jure* bind their Successors. *Secondly*, That *Henry* VII. was King *de Jure* at the Time of making this Law; and could not be dispossess'd of his Throne, but by a Person, who had less Right to it than himself: And *Thirdly*, That when this Act was passed, *Henry* VII. was daily threatned with an Invasion from *Perkin Warbeck*; the Issue of which, in regard to the Hatred, which was still borne him by the Friends

Friends to the House of *York*, could not but be doubtful and uncertain. These things consider'd, it will certainly be allowed, there was great occasion for such a Law, as would effectually secure his Adherents from the Danger of incurring a Forfeiture of their Lives, Estates, and Liberties, which, without such Provision, could not possibly be safe. For, as *Henry* VII. had attainted those that fought for *Richard* III; so *Perkin*, if he had succeeded, might have used those, that were in Arms for *Henry* VII, in the same manner; unless disabled by some Legal Restraint, such as this Statute was; which provides amply for the Security of all those, that attended *Henry* VII. in his Wars. In a word, as without such a Law the Party of *Henry* VII. would have been in great Danger, had their Army been defeated; so by Virtue of it, they must have been entirely safe: Because as *Henry* VII. and his Parliament would not presume to slight the Authority of the Laws of *Richard* III, but esteem'd them all good and obligatory; upon the same Principles, whoever had forced *Henry* VII. from his Throne, and taken Possession of it, must have been obliged by his Laws, and could have done nothing against them, without Violence and Injustice. So that whereas it had been usual in former Revolutions, to attaint in Parliament the *Defeated Party*; this Law of *Henry* VII. was an effectual Bar against such Proceedings; and would be able sufficiently to protect his Friends from all manner of Forfeitures and Attainders. This I take to be the genuine and true Meaning of this Law; and if I am not much mistaken, no other Exposition of it will be found so worthy of the Character of *Henry* VII; so suitable to the Circumstances of those Times; and so intelligible and rational: For from hence it will presently appear, why Serving *Henry* VII. *in his Wars*, is styled in this Act, *doing their true Duty and Allegiance*; and why it is also said, *to be against all Laws, Reason, and good Conscience, that Subjects should suffer for so doing*; *viz.* because *Henry* VII. having a Right at that Time to be consider'd as King *de Jure*, he had a good Title to the Obedience of his Subjects; and consequently the Punishing them upon that Account, would have been an Action in itself highly unreasonable, and unjust. And this was so far the Case of *Richard* III, that had he made such a

Law

Law as this, for indemnifying those, that fought for him; they could not possibly have been attainted by *Henry* VII: So that the Wisdom of this Law, thus explained, is highly to be extolled, and is truly admirable; since now, whatever might be the Events of War, Subjects could never suffer for defending their Lawful (*y*) Prince; the Power of the prevailing Invader being now limited to that Degree, that he must first do Violence to the Laws, before he could hurt the Persons or Fortunes of those that opposed him. A Consideration undoubtedly of great Moment, for the encouraging of Subjects to persevere in their Fidelity to *Lawful* Princes; for though it ever was, and will be *against Reason, and good Conscience*, to punish Persons for doing this their Duty; yet it will always be found true, that the general Laws of Nature have never that Authority and Influence over Ambitious Princes, as those particular Laws of the Kingdom they are to Govern. And the Reason is plainly this; because they had much rather offend God, whom they do not fear, than their People, whom they do. And therefore, though it was an Action in itself just, and lawful, to defend *Richard* III. against *Henry* VII, who had no manner of Title to the Crown; yet since *Richard* was, in other respects, no better than a King *de Facto*; and no Act of Parliament had particularly provided for the Safety of those, that fought for him; we see *Henry* VII. was so little moved with any Considerations of *Reason, and good Conscience*, as to proceed with the utmost Severity against them in his Parliaments.

By what I have said upon this Occasion, it is evident, that *Henry* VII. could propose no Advantage to himself from this Statute, any otherwise, than as he

(*y*) 30*th* Sept. 1644. *King* Charles I. *issued out a Proclamation, declaring his Resolutions for a speedy Peace; in which are the following Words.* We do desire all of them, as well in our own Quarters, as where the Rebels have usurped a Power, to take into serious Consideration the Duty and Loyalty, which by the Law of God, and their Oath of Allegiance, they owe to us; and more particularly that Part thereof, which concerns the Defence of our Person, and Assistance of us against Rebels, and such as rise in Arms against us; which they may find plainly set down in the Statute of the 11th Year of *Henry* VII. cap. 1. *The Perusal of this Statute he had earnestly recommended before, in his Answer to the Declaration of the Parliament*, May 4. 1642. *And afterwards, in his Answer to their Remonstrance*, May 26. 1642. *speaking of this Statute, he says*, His Good Subjects will read it with Comfort. *See* Rushworth's Collections, Part 3. Vol. 1. p. 598.

was

was King *de Jure*; that is, as he was in Danger from no Adversary, who had a better Title than himself. And from thence I shall presume to inferr, that the Interest and Security of the Followers of Kings *de Facto*, was not the original Design or Intention of this Law. If it is objected, that whatever the Intention of the *Lawgivers* might have been, the Words of it are plainly applicable to Kings *de Facto*; and in this Sense have been often expounded by some of the most eminent Lawyers; I must deny, that the Words are thus fairly to be understood: And indeed if they were, the Act would be manifestly inconsistent with itself. *First*, I say, the Words are not properly and fairly applicable to a King *de Facto*; because, though a King *de Facto* is a *King for the Time being*, yet he is such a one, as could not possibly be thought of in this Statute; for Kings *de Jure* cannot well be supposed to intend the Good and Interest of *Usurpers*; nor could *Henry* VII, for the same Reason, mean any other by a *King for the Time being*, than such a one, as himself was: And whoever is of a contrary Opinion, may as well believe, that *Henry* VII, when he made this Statute, design'd it only for the Service of *Perkin Warbeck*, who was like to be *King for the Time being* in a few Months, for any thing that could be certainly foreseen to the contrary. *Secondly*, This Law would be inconsistent with itself, if applied to Kings *de Facto*; for the last Clause of it utterly excludes such an Interpretation. The Words are these; *Provided alwaie, that no Person or Persons shall take any Benefit or Advantage by this Act, which shall hereafter decline from his or their said Allegiance:* That is, whoever at this Time (when *Henry* VII. was threatned with an Invasion) should declare for *Perkin Warbeck*, and should endeavour to support his Interest, and maintain him in his unjust Acquisitions; they were not to have the Benefit of this Statute, if ever *Henry* VII. should again recover his Right; though they might plead they had been in the Service of a *King for the Time being*. From whence it is beyond Contradiction evident, even by the Authority of this Statute, that there may be some Kings *de Facto*, to whom it may be dangerous to do any Service; I mean such, as should depose a Rightful Prince, (which was the Design of *Perkin Warbeck*) and place themselves in his Throne; for it is expresly declared in

the Clauſe abovementioned, that this Statute ſhould not be available to any Perſons, who act in the Defence of ſuch Uſurpers againſt the (z) Prince, to whom their *Allegiance* was before due.

(z) *This is own'd by the Doctor himſelf*, View, p. 68.

But if, notwithſtanding all I have now urged to the contrary, it ſhall be ſtill thought reaſonable to believe, that this Statute was at firſt intended, and may, upon a proper Occaſion, be made uſe of, for the Intereſt and Benefit of the Adherents to a King *de Facto*; I muſt however deſire thoſe, who are of this Opinion, to abate ſomething of their Confidence, till thoſe, who are the proper Judges of ſuch Matters, have by their publick Reſolutions determin'd the Senſe of it. For though ſome great Lawyers have left certain Paſſages in their Writings, in Favour of this Opinion, (which I am haſtning to examine) yet the Meaning of this Law was never yet aſcertain'd by any Judicial Proceedings; nor was it ever yet put in Execution by the Courts of Juſtice. It was pleaded indeed by the *Regicides*, at their Tryal; and they were the only Perſons, that ever claim'd any Benefit from it; but it is well known, the Court overruled their Plea, as not at all pertinent, or of any manner of Uſe upon that Occaſion. It is true, Chief Baron *Bridgeman* did then give his Opinion concerning this Statute, *viz.* (a) *That it was made for a King* de Facto *againſt a King* de Jure: But I ſhall preſently ſhew, that his Lordſhip's uſual Exactneſs herein fail'd him; which could not poſſibly have happen'd, had the Conſideration of this Statute come properly before him, and any Streſs been really laid upon it; for then his Lordſhip would have had more Leiſure to form his Judgment, before he had deliver'd it. So that if it ſhould fall out (as who can tell, what Revolutions may happen in a Country given to Change?) that a King *de Jure*, ſome time or other, ſhould by Force and Violence diſpoſſeſs a King *de Facto* of his Throne; who can be ſure, what the Opinion of Parliament, or the Judges may be, when thoſe that ſhall have followed the Fortunes of the King in Poſſeſſion, ſhall plead this Statute for Protection and Impunity? Surely it may be a Queſtion, whether then ſuch Perſons will be allowed to have *done their true Duty of Allegiance*; and conſequently, whether I am in the wrong or no, is at leaſt a Point not yet decided; cannot ſafely be ſubmitted

(a) J. Cook's *Tryal.*

mitted to any private Judgment; and may possibly at last be determin'd agreeably with the Opinion I have now delivered.

I AM in the next place to take Notice of certain Passages, which the Doctor has cited, to prove, that some of the greatest Lawyers have been of his Mind in the Exposition of this Statute; but since my Lord *Bacon* and *Bridgeman* are the only two he has mention'd, who speak directly, and purposely concerning it, I need not trouble myself at present about any other. As for my Lord *Bacon*, I must confess, I am at a Loss, how to understand him, when he says, (*b*) *This was a Law of a strange Nature, rather Just than Legal, and more Magnanimous than Provident*; for it is not easy to conceive, how a Law can be *Just*, and not *Legal*; unless his Lordship meant, that it was not agreeable with the Laws then in Being, and the *Constitution* of the Government: Which Opinion would be directly contrary to what the Doctor has asserted throughout his Books; where we are often told, that the Indemnity of those, who serv'd a King *de Facto*, was sufficiently provided for before *Henry* VII.'s Reign. But I return to my Lord *Bacon*; He tells us, that this *Law was more magnanimous than provident*: And soon after he says, it had *Parts of prudent and deep Foresight*; because *People were thereby hindred from busying themselves in prying into the King's Title; for that however it fell, their Safety was now provided for.* And upon the same Account, he thinks it agreeable to Reason of State; because otherwise the *Subjects might trouble themselves with Enquiries into the Justness of the King's Title, or Quarrel.* But I think I have clearly proved, that *Henry* VII, at the Time of Making this Law, had a good Title against every body; since his Queen's Consent was never doubted of, whose Claim and Opposition alone could render him an *Usurper*. So that he had no Cause to be disturbed about *the People's prying into his Title*, since they could not dispute his Queen's; upon which, at last, if he had found it necessary, he would have been sure to have plac'd his Confidence and Dependence. For, I beg Leave to add, had *Perkin Warbeck* been the Real, as it was well known, he was only the Fictitious Son of *Edward* IV; and had his Enterprize succeeded; *Henry* VII. was too wise a Prince, to imagine, this Law of his would have

(*b*) Hist. Hen. 7. p. 144.

have been able to ſecure thoſe, that fought for him: He knew very well, by the then late Example of *Edward* IV, that the Laws of Kings *de Facto* could not bind Kings *de Jure*, eſpecially when directly againſt their Intereſt and Advantage; and therefore had he been in Danger from any *Rightful Pretender*, he would not have given himſelf the Trouble of making a Law, that could do his Party no Manner of Service. Let it not now be thought too great a Preſumption in me, to ſay, my Lord *Bacon* was miſtaken in this Point; for as he could not be a Man, if he was not ſubject to Error; ſo he may ſtill be a great one, though his Judgment ſometimes fails him.

My Lord Keeper *Bridgeman*'s Opinion is in the Tryal of *Cook* the *Regicide*; where ſpeaking of this Law of *Henry* VII, he has theſe Words; *King* Henry *took Care for him who was King* de Facto, *that his Subjects might be encouraged to follow him; to preſerve them, whatever the Event of the King was.* And again, *That that King* Henry VII. *did, was to take Care of the King* de Facto *againſt the King* de Jure. This Paſſage the (*c*) Doctor fancies is fully to his Purpoſe; though, in another Place, (*d*) he allows *Henry* VII. to be a King *de Jure*; and the Truth is, who the King *de Jure* was, that *Henry* VII. *took Care againſt in this Statute*, will be paſt any one's Power to find out. I muſt take the Liberty therefore to ſay, with a juſt Deference to the Learning and Judgment of that worthy Perſon, that his Lordſhip ſuffer'd himſelf here to fall into this Error, through Inadvertency, and want of a due Regard to the Condition and Circumſtances of *Henry* VII, who was ſo far from being barely a King *de Facto*, at the Time we are ſpeaking of, that it will be very difficult to have a right Notion of a King *de Jure*, if he was not ſo.

(*c*) *View*, p. 82.
(*d*) *View*, p. 65, 66.

The Doctor will not give me Leave to finiſh my Diſcourſe on this Argument; and I muſt obey him. It had been objected, that when the Duke of *Northumberland* was tried for being in Arms for the Lady *Jane Grey*, it would have been proper for him to have pleaded this Statute, if it was really for the Benefit of thoſe, that ſerved a King *de Facto*; and it had likewiſe been obſerved, that he did actually alledge in his *Defence*, that *he acted by a Commiſſion* under the Great Seal, and by *Order of a Privy Council*; to which the Reply made by the Court

Court was, *That the Great Seal, which he pretended for his Warrant, was not the Seal of the Lawful Queen of the Realm, but the Seal of an Usurper, who had no Authority.* (Stow's *and* Holinshead's *Chronicles.)* Now the Doctor has not thought fit to take Notice of this Declaration of the Duke of *Northumberland*'s Judges; but contents himself with the following Answer: *First*, (*e*) He says, *it is to be observed, that Queen* Mary, *in a Letter she writ to the Lords of the Council, notified her Claim, and required them, upon their Allegiance, to proclaim her Title at* London: *That this Letter was deliver'd to the Lords, not only before they had proclaim'd the Lady* Jane, *but before they had published King* Edward's *Death, or so much as acquainted the Lady* Jane *with their Design to set her up to succeed him; as appears both from the Bishop of* Sarum's History of the Reformation, *and from Dr.* Heylin's. *The latter has printed this Letter at large; in which there is a Passage, that would induce one to believe, that she had been proclaim'd somewhere before she writ it.*

(*e*) *View*, p. 67, &c.

But, *First*, Were the Doctor in the right in all these Points of History, they would not fully turn to his Account: For were it true, that the Lady *Jane* was never in Possession of the Crown; and consequently, that the Duke of *Northumberland* did not *act under the Broad-Seal, and by Order of the Council of a Queen* de Facto; yet it would be nevertheless true also, that the *Judges* were of Opinion, that the *Broad-Seal of an Usurper was of no Authority*; which is the main thing the Doctor's Adversaries insisted upon; and therefore chiefly deserved his Consideration.

Secondly, It is not so clear a Case, as he is pleas'd to believe, that the Lady *Jane* was not in *Possession of the Crown*; for not only her own Council was of that Opinion; but Queen *Mary* seems to confess it; and many Circumstances concurr to shew, it was a Fact, which could not well be doubted of. *First*, I say, her own *Privy Council* made no question of her being Queen *de Facto*; for they expressly affirm it in their Letter to the Sheriff of *Kent*; which begins thus: (*f*) *After our hearty Commendations*, &c. *Whereas the Queen's Highness* Queen Jane, *being presently by Just Title in full Possession of the Imperial Crown of this Realm, and other Dominions, and Pre-eminences thereunto belonging*, &c. which I should not insist

(*f*) *This Letter was dated* July 12. 1553. *and a Copy of it will be found in the* Appendix, N. 5.

insist upon, if we were only disputing the Point of Right; for therein we are sure they err'd. But whether the Lady *Jane* was in *Possession* or no, was a Matter of *Fact*, which they could not be mistaken in; and I hope the Characters of Archbishop *Cranmer*, Sir *William Cecil*, and Sir *John Cheek*, (three of the Subscribers to this Paper, not to mention the rest) will protect them from the base Suspicion of saying any thing, contrary to their Knowledge. *Secondly*, Queen *Mary* herself confesses as much; for she openly declares, (*g*) That *her own most Lawful Possession was for a Time disturbed and disquieted, by the Trayterous Rebellion and Usurpation of the Lady* Jane Grey; and we have observed, that the Judges gave their Opinion at the Tryal of the Duke of *Northumberland*, that the Broad-Seal of that Lady, being an *Usurper*, was of no Authority: Now she could no otherwise *disturb the Possession* of that Queen, than by being in the Throne herself; neither could she deserve the Name of an *Usurper*, but by settling the Crown upon her own Head, which belonged to another Person. *Thirdly*, Several other Circumstances concurr to shew, it was a Matter of Fact, that cannot well be doubted of: Did not King *Edward*'s Council openly and avowedly declare for Her? Did not all the Judges, and many of the first Quality in the Kingdom, subscribe to King *Edward*'s *Device* of the Succession? And was not the (*h*) chief Body of the Nobility on her side? insomuch that it may be question'd, whether the Duke of *Northumberland* could have been tryed, if those Lords had been excepted out of the Number of his Judges, who had been guilty of the same Crime with himself. *Lastly*, Was not the City and Tower of *London*, and all the Forts of the Kingdom, in her Hands? And was there any visible Power in the Realm for some time, that seem'd capable of opposing her Pretensions? But after all, the (*i*) Doctor is positive, that *she was never settled in the Throne; but fell, whilst the Duke of* Northumberland *and his Faction was struggling to thrust her into it.* But she might be Queen

(*g*) 1 Mar. 4.

(*h*) *The Lady* Jane's *Council in their Letter to Queen* Mary (June 9. *in* Fox *and* Holinshead) *tell her*, That King *Edward* had appointed the Lady *Jane* his Successor, by his Letters Patent, sign'd with his own Hand, and sealed with the Great Seal of *England*, in Presence of the most part of the Nobles, Counsellors, Judges, *&c.* subscribing the same.

(*i*) *View*, p. 68.

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de Facto, tho' ſhe was not *fully in Poſſeſſion*; for he allows the Title of King to *Stephen*, tho' for much the greater Part of his Reign, he was hardly Maſter of more than half the Kingdom; and *Edward* IV. is ſaid in the (*k*) Records, to *have been in Poſſeſſion of the Crown from the* 4*th of* March, tho' *Henry* VI. was then at the Head of a greater Army than his, and the fatal Battle of *Towton-Field* was not fought till ſome while after.

Thirdly, The Doctor's Obſervations from Hiſtory, againſt the Poſſeſſion of the Lady *Jane*, are not ſo inconteſtable, as he may imagine. Queen *Mary*'s Letter to her Brother's Council, which he cites from Dr. *Heylin*, had been firſt printed by Mr. *Fox* and *Holinſhead:* Now, though ſhe lays Claim to the Crown in that Letter, yet ſhe did not aſſume the Regal Title and Style; for it is not Dated in *the Firſt Year of her Reign:* And Dr. *Heylin* will acquaint the Doctor, that ſhe did not take upon her the Name of *Queen*, till ſhe came to *Framlingham* Caſtle in *Suffolk*, which was eight or nine Days after King *Edward*'s Death. From whence we may obſerve, that the Doctor is alſo miſtaken in another Point of Hiſtory, when he pretends, that Queen *Mary* had been proclaim'd *Queen*, before the Lady *Jane:* This could not certainly be done by her Order, before ſhe took upon her the Title of *Queen*, which I have ſhewed was not till the fourteenth of *June*; but the Lady *Jane* was proclaim'd on the tenth. Queen *Mary* indeed ſent to the Mayor of *Norwich* on the twelfth of *July* to proclaim her; but (*l*) my Author ſays, *finding the* Norfolk *Men not ſo forward as ſhe expected, ſhe removes with her ſmall Party to* Framlingham. That the Lady *Jane* knew nothing of the Deſign of making her *Queen*, three or four Days after King *Edward*'s Death, is hardly credible; ſurely ſhe knew, that King *Edward* had appointed her his Succeſſor, a Month before: And Doctor (*m*) *Heylin* (an Author whom the Doctor chooſes to cite upon theſe Occaſions) expreſly affirms, That (on the tenth of *June*) *the Lady* Jane *could not be ignorant of*

(*k*) Rot. Parl. 1 Edw. 4. *It is declared*, That *Edward* IV. was in Right, from the Death of the Noble and Famous Prince his Father, very Juſt King of *England*, and in the 4th Day of *March* in Lawful Poſſeſſion of the ſaid Realm.---- *And afterwards, he is ſaid to* have been lawfully ſeized and poſſeſſed, from the 4th of *March*, of all Caſtles, Lordſhips, Mannors, Lands, *&c.* as *Richard* II. was poſſeſſed of, in the Feaſt of St. *Matthew*, in the 23d Year of his Reign.

(*l*) J. Stow's *Chron. and Dr.* Heylin's *Hiſt. Ref.*

(*m*) *Hiſt. Ref.* p. 159.

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that which had been done, in order to her Advancement to the Royal Throne. But (the Doctor adds) *the Lady* Jane *was no Lawful Queen; she had no Consent of the States, no Recognition by Act of Parliament, as all those Kings have had, whose Royal Authority has been own'd by the Laws, without an Hereditary Title.* By this Answer the Doctor has plainly alter'd the State of the Question: Hitherto he had laid it down for Law, that whoever was in *Possession*, was a *Lawful King*; now it seems, that is not enough; but *the Consent of the States, and Recognition in Parliament is necessary.* I am not now at Leisure to dispute this Point with the Doctor: But if the Power of the People is so considerable, that they can create a Title, when they please, by their bare Consent; I am afraid, they can destroy one too, only by withdrawing it; and what any Republican can desire of the Doctor more than this, is hard to divine. Lastly: The Doctor concludes, *The Duke of* Northumberland *had no Right to plead this Statute; for being the principal Author of this Revolt, he was by the last Clause of this Act cut off from any Benefit of it. This Act was made for the Security of those, who submit to a King for the Time being, after he is establish'd; not for those, that overturn Governments; who whatever they may plead for themselves, it can never be the Eleventh of* Henry VII. Here we have the Doctor's Confession, that whoever are instrumental and active in putting the Lawful Heir from his Right, may be truly term'd *Revolters*; and consequently cannot claim any Benefit from this Statute. So that had the Lady *Jane* reign'd as many Years, as she did Days; and had Queen *Mary* at last forced her from the Throne; the Duke of *Northumberland* would have been still in the same Danger, and liable to be punish'd as a Revolter. This, by the Doctor's Leave, is such a Blow to the Power of Kings *de Facto*, as could not well be expected from their professed Advocate; for now it seems, those Persons, to whom they owed most, are least capable of their Protection; and their best Friends must unavoidably be in the worst Condition: For whenever the Heir shall recover his Right, there is no Law to shelter from his Resentments such as opposed his Claim, and lent their Assistance to his Enemy. And who can tell, upon such a Revolution, how great a Number of Subjects may be comprehended under the Name of *Revolters?* Whoever took up Arms

for

for him, or assisted him with Men and Money; the Soldiers that fought for him; the *Divines* that made it Gospel; and the Gentlemen of the *Inns of Court*, that made it Law, are all involved in the Guilt of *Departing* from their Allegiance, by Virtue of this *Clause*, as the Doctor has expounded it. Thus we see, into what a narrow Compass the mighty Services, which were hoped for from this *Act* of *Henry* VII, are reduced by the final Clause of it. When the Government indeed of a King *de Facto* is settled, and his Enemies entirely subdued, the Doctor thinks it a just and wise thing to submit and swear to him; and will warrant it to be lawful by the Authority of this Statute; but for those that shall have brought about this Settlement, who may be sometimes the chief Gentry and Nobility of the Kingdom; they are all abandon'd to the Mercy of the Injur'd Prince, if he ever returns; and must be beholden to him, if they escape with Impunity. The Doctor's last Refuge in this Case can be only this; That by Virtue of a Pardon from a King *de Facto*, when he is thorowly settled, these *Revolters* will be safe against a King *de Jure*. But if the *Acts of Parliament* of those *Pretended Kings* were not of sufficient Force against *Edward* IV, it is to be feared, their *Pardons* will not be esteemed of better Authority. My Lord Chief Justice *Montague* (*n*) declares, that he would never have set his Hand to King *Edward*'s Settlement of the Succession on the Lady *Jane*, if the *King* had not promised him a Pardon; which he knew would be good against Queen *Mary*, if she came to the Crown; because she could only have it as a *Purchaser*: From whence it is plain, he would not have thought himself safe, by that Pardon, if he had believed Queen *Mary* could have claimed the Crown, by Right of *Inheritance*. I would recommend this to the Doctor's Consideration. He is pleased indeed to add, (*o*) that Kings *de Facto* have actually given Indemnity by Parliament, to those that assisted them in obtaining the Crown; and he instances in the *Acts* of *Henry* III, *Henry* IV, and *Henry* VII, which were purposely made for protecting those, that had been active in advancing those Princes to the Throne. But if *Edward* II, and *Richard* II, had ever recover'd their Thrones, does the Doctor seriously believe, those *Acts* would have been really available for

(*n*) *See his Apology in* Fuller's *Ch. History.*

(*o*) *View*, p. 47, 48.

the Indemnity of their Rebellious Subjects? I am persuaded, the Kings that made them, were never of that Opinion. The true Reason of these *Acts* was to prevent Vexatious Suits, and other Prosecutions by one Subject against another. For many Acts of Violence, and Outrages having been committed, upon the Account of such Invasions, which exposed the Doers of them to the Severity of the Law; the Injured Subjects might have had their Remedy against those Offenders, by *Indictments* for Murder, *Actions* of Trespass, *&c.* unless timely disabled by *Acts* of this Nature; which will be always necessary for the Adherents to *unjust Pretenders*, who depose Lawful Princes. But the Case is quite different, when Kings *de Jure* are the Invaders; for whoever assists them in their Quarrel, need no Act of Parliament for their Indemnity.

THUS I have fully consider'd all, that the Doctor has been pleased to urge from the Eleventh of *Hen.* VII; and by what I have observed upon this Occasion, the Reader will undoubtedly be surprized at the following Passage in the Doctor's *View*. (p) *Those who fought for the King for the Time being, wanted no Act of Parliament to indemnify them; nor had they any.* And again: *Did the King in Possession, or his Parliament, or the Parties concerned, ever think an Act of Parliament was wanting for those, who fought for him, against a Person out of Possession, whatever Title he had, or pretended to have? Can there be one Instance given of this, in all our Laws or History?* But afterwards he tells us, (q) *This Act* [*viz.* 11 Hen. 7.] *was made for the Security of those, who submit to a King for the Time being, after he is established.* The Doctor may try to reconcile these Passages, if he pleases.

(p) *View*, p. 47.

(q) P. 68.

Lastly, After all that has been said concerning the Meaning, and Authority of this Statute, may it not be doubted, whether it is now in Force? My Reason is this; In King *William*'s Reign an Act was passed, which declares the Subjects absolv'd from their Allegiance, if the King of *England* should ever appear to be a Papist: Now this *Act* cannot possibly signify any thing, if *Subjects, who serve and defend the King for the Time being, do their true Duty and Allegiance*; as is affirm'd by this Law of *Henry* VII.

AND

And now having had Occasion to mention the Case of Queen *Mary* and the Lady *Jane Grey*, I beg Leave to subjoin the Judgment of the Lord Chief Justice *Hale* upon that Matter, as not unworthy of the Reader's Observation.

(r) *If the Right Heir of the Crown be in actual Exercise of the Sovereignty; suppose in one Part of the Kingdom, and an Usurper be in the actual Exercise of the Sovereignty in another; yet the Law judgeth him in Possession of the Crown, that hath the True Right; and the other is in Truth, not so much as a King* de Facto, *but a Disturber only; and therefore not a King within the Twenty Fifth of* Edward III. *This was the Case between* Edward IV, *and* Henry VI. *Altho'* Edward IV. *took upon him the Sovereignty, and was declared King in* London *upon the Fourth of* March 1460; *yet* Henry VI. *was in the Northern Parts, and treated as a King, and rais'd a great Army; which being subdued by King* Edward IV, *in the latter End of* May, *in the bloody Battle of* Towton-Field; *then, and not till then, had* Edward IV. *the total and quiet Possession of the Crown; and in* November *following held a Parliament, wherein his Title is declared, and the Commencement of his Reign enacted to be the Fourth of* March *before; and* Henry IV, Henry V, *and* Henry VI, *declared* Usurpers. *During this Interval, from the Fourth of* March *to* June, Henry VI. *was used as King, and yet was not so much as King* de Facto; Edward IV, *the* Right Heir, *being likewise in Possession of the Regality.*

(r) Historia Placitorum Coronæ MS. Vol. 1. c. 13.

The like was between Queen Mary, *and the Lady* Jane Dudley, *who was proclaimed Queen at* London, *by Pretence of Nomination by King* Edward VI; *but held not that Title above ten Days. For the same time Queen* Mary *openly laid Claim to the Crown, and was also proclaimed Queen: So that both being* de Facto *in Possession of the Crown, the Law adjudged Possession in her, that had the Right*, viz. *Queen* Mary; *and therefore by an Act of Parliament* (1 Mar. c. 3.) *it is enacted, that Recognizances dated* Anno Primo Reginæ Jane, *shall be allowed as good; which needed not have been, if she had been* Regina de Facto, *though an* Usurper: *Because Judicial Acts are not Diminutions of the Regal Revenue,* 9 Edw. 4. 15. 11.

And if any shall say, that if Henry VI, *or Queen* Jane, *had gotten the Victory, and Possession of the Crown, that possibly as much would have been asserted by them and their Parliaments*

ments against Edward IV. *and Queen* Mary; *This is an Objection of no Value; for I do not take my Measures herein from Events, which are various and uncertain; but according to the true Right of Matters, pursuant to the Laws of* England, *as near as I can.*

It remains now to be consider'd, what Authority is to be attributed to the Opinion of *Henry* VII.'s Judges, concerning the *Crown's taking away all Defects and Stops of Blood*; and whether it is of that mighty Advantage, as has been pretended, for Kings *de Facto*. The (*s*) Doctor indeed insists much upon it, and cannot forbear frequently assuring his Reader, that he reposes an entire Confidence in it. Let us now see, whether this Resolution of the Judges, as unanimous as it was, can afford any substantial and real Encouragement to the Advocates of Kings *de Facto*. In the first place therefore I observe, that this unanimous Resolution of the Judges was *Extra-Judicial*, and consequently of less Authority, than if it had been given upon the Bench; (*t*) for when *they deliver their Opinions out of Court, they do not hold themselves to be upon Oath; and therefore, tho' two or more should be of a different Opinion from the rest, they do not refuse to sign the Resolution of the major Part; and so it goes under the Denomination of all the Judges.* The unanimous Opinion of the Judges is undoubtedly of great Authority; but I am afraid the Doctor attributes too much to it, when (*u*) he makes it a *Part of the Common Law of this Realm*: For it may be remember'd, that the whole Bench of Judges were at first *unanimous* in the Case of *Ship-Money*; and yet the Doctor knows, that Opinion was condemn'd as erroneous. I must beg Leave therefore to think it possible, that the *Reverend Bench* may sometimes err in their Resolutions; and whether they did not in the Case before us, is now the Question. *Secondly*, Therefore I affirm, that this Proposition, *viz. That the Possession of the Crown removes all Defects in Blood, and all other Impediments*, is not universally true; for if it were, then no *Acts of Parliament* for Disabling or Excluding any Persons from the Succession, could be of any Force, when such Persons are on the Throne; nor in the least restrain the Subjects from paying their Allegiance to them. An Assertion, which highly reflects upon the Honour and Wisdom of those Parliaments, which have made it Treason to invade

(*s*) *See View*, p. 20, 42, 45.

(*t*) *Cases in Parliament resolv'd in* Purbeck's *Case*, p. 9.

(*u*) *View*, p. 20.

vade and hold the Crown, against the establish'd Order of Succession; which have declared, that whoever should be guilty of such an Act of Violence and Injustice, ought to be esteem'd as no better than *Usurpers and Traitors*; and lastly, that it is the Duty of Subjects to take up Arms against such Intruders, as being absolv'd entirely from their Obedience to them. In King *Henry* VIII.'s Act (*x*) for Establishing the Succession, *Whosoever should interrupt the Succession appointed by Law, or by the Last Will and Testament of that King, is adjudged a High Traitor.* And in the 1 *Edw.* 6. 12. the following Words are remarkable: *Be it farther enacted, that if any of the Heirs of the King our Sovereign Lord that now is, or any Person or Persons, to whom the Crown and Dignity of this Realm is limited by Act of Parliament, made in the Five and thirtieth Year of the Reign of the late King* Henry VIII, *or the Heirs of any of them, do at any Time hereafter usurp, the one of them upon the other, in the Crown of this Realm; or demand, challenge, or claim the same, otherwise, or in any other Form or Degree of Descent, or Succession,* &c. *but only in such Manner and Form, as is declared by the said Statute; or if any of the said Heirs or Persons aforesaid, do interrupt, or let the King's Highness, that now is, peaceably and quietly to keep, have, and enjoy the said Imperial Crown, that then all and singular the Offenders,* &c. *shall be deemed and adjudged High Traitors, and shall suffer and incurr the Pains of Death,* &c. *as in Cases of High Treason.* From which Passage it is undeniably plain and evident, that Persons in actual Possession of the Crown, may be at the same time no better than *Usurpers* and *Traitors*, and liable to the Pains of Treason; and consequently, it was the Intention of those Legislators, that such Persons should be unable and incapable to hold the Crown, notwithstanding their being Kings *de Facto.* And the Truth is, if it was possible for any Prince to be under a Legal Incapacity of possessing the Crown, one would think *Henry* VII. was that Person: For first of all, as descended from a Natural Son of *John of Gaunt*, he was excluded by *Common Law*; and this *Exclusion* was expresly confirm'd by *Act of Parliament.* Secondly, He had been attainted in Parliament. And lastly, the whole Kingdom had (*y*) obliged themselves *to take, accept, and repute King* Edward IV. *and his Heirs, to be Kings of* England, *and none other.* But it seems,

(*x*) 35 Hen. 8. 1.

(*y*) Rot. Parl. 1 Edw. 4.

no Laws can have any Force or Authority against a *King in Possession*: This is a clear Case, by Virtue of the Resolution of *Henry* VII.'s Judges; and those Parliaments were very ignorant of their Power, which pretended to make Laws, to hinder Subjects from obeying Usurpers. *Thirdly*, Had it been a known Maxim of the Law of *England*, *That the Crown takes away all Defects and Incapacities*, according to the Doctor's Opinion; we should never meet with Acts of Parliament, which approve of and commend Actions done in Contempt of it. Thus, for Instance, we find Attempts made by the Right Heir for recovering his Inheritance, justified as agreeable to the Laws of God and Nature; and the Dispossessing of the Intruder, declared Just and Legal. Let the Doctor be pleased to cast his Eyes upon the following Passages, and he will be sensible, I do not impose upon him.

(z) Rot. Parl. 1 Edw. 4.

(z) Richard *Duke of* York *attempting by Force of Arms to recover his Right to the Crown of* England *against* Henry VI, *used the Benefit of the Law of Nature, not having then any Lord above him in* England *but* God; *and it was Lawful, and according to Law, Reason, and Justice for him so to do.* And it is farther declared, (a) *That the Taking of Possession, and Entree into the Exercise of the Royal Estate, Dignity, Reign, and Governance of the Realm of* England, &c. *by our Sovereign Leige Lord King* Edward IV, *&c. and the Amotion of* Henry, *late called King* Henry VI, *from the Exercise, Occupation, Usurpation, Intrusion, Reign, and Governance of the said Realm*, &c. *done by our said Lord King* Edw. IV, *was, and is rightwise, lawful, and according to the Laws and Customs of the said Realm; and so ought to be taken, holden, reputed, and accepted.* I may leave it now to the Reader to determine, whether such Princes could have a Right to the Allegiance of those, who might lawfully, and justly depose them; and I am much mistaken, if the Doctor will find it possible to elude the Force of these Authorities. I had Reason therefore to say, it is not universally true, *that the Crown takes away all Defects and Incapacities*; for then Kings in Possession could not possibly be *Usurpers*, or *Traitors*; neither could it be ever justifiable to attempt their Removal from their Thrones; which yet we see has been warranted by several Acts of Parliament. *Lastly*, The Doctor cannot reasonably imagine, that the Opinion of *Henry* VII.'s Judges should be of sufficient

(a) Ibid.

Autho-

Authority to determine the present Controversy; for this is making a King *de Facto* Judge in his own Cause; who will not fail to interpret the Laws, as they may best serve his Purpose. At this rate, I confess, the Doctor is sure of gaining his Point; and he may be confident there never was, nor can be in Nature, so strange a Creature, as an Unlawful King. I cannot however but wonder, that a Person so eminent for his Knowledge and Penetration, as the Lord Chancellor *Clarendon*, should so little discern the Evidence of this Maxim, as to think the Judges could not fairly apply it to the Case of *Henry* VII. His Words deserve to be taken Notice of, as a strange Instance of Short-sightedness in that great Man; and therefore I shall recite them at large. *Neither will that single Precedent* (says (*b*) he) *of the Judges, in the Case of King* Henry VII, *when they declared the Act of Attainder to be void by the Accession of the Crown, (tho' if he had been in Truth the Person, upon whom the Crown had Lineally and Rightfully descended, it was good Law) find, or make the Judges of another Age parallel to them; till the King hath as strong a Sword in his Hand, and the People as much at his Devotion and Disposal; and then the Making and Declaring a Law, will be of equal Facility, tho' it may be not of equal Justice.* Thus we see, how unfortunate this noble Lord was, in his Opinion of this Resolution of *Henry* VII.'s Judges; he calls it a *single Precedent*; he thinks it would hardly be followed by any other Judges; and plainly intimates, that it was not *good Law*, by reason of the Defects in *Henry* VII.'s Title. And this one Circumstance of its being a single Precedent, is enough to spoil the Credit and Authority of this Resolution; for may it not reasonably be doubted, whether the Judges of Kings *de Jure* (if ever their Opinions should be demanded in such a Case) would allow Kings *de Facto* the Benefit of that Maxim? And has not another great Ornament of his Profession (*c*) told us, *That the Judges in* Westminster-Hall *do sometimes deny a Case, that stands single, and alone of itself?* The Doctor indeed (*d*) assures us, that in Consideration of the Authority of this Maxim, *the Act that illegitimated Queen* Elizabeth, *was never reversed by the Lord Keeper* Bacon's *Advice.* But the Doctor knows very well, that Queen *Elizabeth* had a Title by the *Act of Succession*, and her Father's *Will*; whereas *Henry* VII. had no manner of Foundation, upon which he might build any

(*b*) *Hist. Rebell.* Vol. 1. Part 2. p. 430.

(*c*) *Ld. Chancellor* Nottingham's *Argument in Mr.* Howard's *Cause*, p. 30.

(*d*) *View*, p. 46.

any Pretenſion to the Crown: And the Queſtion is not, whether this Maxim would not hold good, where Kings *de Jure* are concern'd; but whether Kings *de Facto* can legally claim any Benefit from it. I muſt not forget, that the Doctor afterwards (*e*) confeſſes, that an Act was paſſed to reſtore *Queen* Elizabeth *in Blood to her Mother*: It is true, he ſays, *this was only that ſhe might inherit the Eſtate of her Mother's Family*, which I am not concern'd to call in Queſtion at preſent. But the Doctor ſhould remember, that Princes never thought it became them to ſlight Acts of Parliament made againſt them by lawful Authority; and therefore *Henry* VII, notwithſtanding the aforeſaid Reſolution of the Judges, took Care, (*f*) *that all Records, wherein there was any Memory, or Mention of his Attainder, ſhould be defaced, cancell'd, and taken off the Files*; leſt ſome time or other, if they continued in Being, they might riſe up in Judgment againſt him; a manifeſt Indication, that he did not think it ſafe to rely upon the Opinions of his Judges.

(*e*) *View*, p. 78.

(*f*) Bacon's Henry 7. p. 13.

Thus I have followed the Doctor through *Henry* VII.'s Reign, which ſeem'd indeed to adminiſter much Conſolation to him; and it muſt be confeſſed, that many Perſons, who had long ſought after Reaſons to juſtify their Submiſſion to the *Powers in Being*, fancied they had met with great Relief from ſome Paſſages, which happen'd under his Government; but I am much miſtaken, if any ſolid Comfort can be derived from them.

I might now perſuade myſelf, I am entirely at Liberty to releaſe my Reader from any farther Trouble; every thing which occurr'd in the Doctor's Writings, that had the leaſt Appearance of an Argument, being, I think, fully conſider'd by me. But the (*g*) Doctor having ſtepped a little out of the Way, to aſſert the Right of the Legiſlative Powers, to limit the Succeſſion, (which may be very true, and yet Allegiance not due to Kings *de Facto*) I ſhall beg Leave ſo far to follow him, as to examine the Truth of ſome Hiſtorical Paſſages, with which he has thought fit to illuſtrate his Argument: And if I miſtake not, this Diſquiſition will give me an Opportunity of clearing a Part of Hiſtory, which has hitherto lain in much Obſcurity. In this Undertaking I ſhall confine myſelf wholly to *Matters of Fact*; and therefore I ſhall not diſpute the Authority of 13 *Eliz.* c. 1. *which*

(*g*) *View*, p. 74, &c.

makes

makes it High Treason during the Queen's Life, and Forfeiture of Goods and Chattels after her Death, to say, that an Act of Parliament is not of sufficient Force to limit and bind the Descent of the Crown; neither shall I in the least question the Power of Parliament to entail the Succession: These Matters are as much out of my Way, as they are above my Reach; and therefore I am very well contented, the Doctor should abound in his own Sense upon them. All that I shall here observe is, that whatever Power Kings, with their Parliaments, may have *de Jure*, upon such Occasions, it is however true *in Fact*, that no Act of *Limitation* could ever yet effectually exclude the next Heir by *Proximity* of Blood; but sooner or later, Providence has hitherto so ordered it, that those who were first in the Line of Descent, have at length gain'd the Crown, notwithstanding all Parliamentary Provisions to the Contrary. I believe it will be allowed, that we have no Laws extant of this Nature, before that of (*h*) *Henry* IV, in which he settles the Succession on his four Sons, and their Heirs, after his Decease; and it is observable, that as he was no better than King *de Facto*, so none but such stood in Need of any Acts of this Kind; for the Common Law provided sufficiently for the Succession of the Issue of Kings *de Jure*. The next Statute we hear of to this Purpose, is that of *Henry* VI, upon his Recovery of the Crown; in which he (*i*) excludes *Edward* IV, and gives the Crown to the Duke of *Clarence*, and his Children, immediately upon the Failure of his own Line; but this had no long Continuance, being (*k*) annull'd, as well as that of *Henry* IV, upon the Succession of the Right Heir. *Richard* III. is said to have appointed the Earl of *Lincoln*, his Sister's Son, his Successor; and *Henry* VII. was no sooner placed in the Throne, but he also procures an (*l*) Act of Parliament, to secure the Inheritance to his Issue; but it is well known, his Son, by the Right of his Mother, had an undoubted Title, without the Assistance of his Father's Law. I come now to *Henry* VIII.'s Reign: This Prince having bastardized both his Daughters by (*m*) Act of Parliament, found it necessary to make use of the same Authority, to render them capable of the Crown. In the Twenty fifth Year therefore of his Reign, another Act is passed, for the *Establishment of the King's Succession*; in which the

(*h*) 7 Hen. 4. 2.

(*i*) Holinshead's *Chronicle*.

(*k*) Rot. Parl. 1 Edw. 4.

(*l*) Rot. Parl. 1 Hen. 7.

(*m*) 28 Hen. 8. 7.

Descent of the Crown is expresly limited to his two Daughters, *Mary*, and *Elizabeth*; and he is impower'd (as he had (*n*) been before) *to give, dispose, appoint, assign, declare, and limit, by his Gracious Letters Patent, under his Great Seal, or else by his Highness Last Will made in Writing, and sign'd with his most Gracious Hand, at his only Pleasure, from Time to Time hereafter, the Imperial Crown of this Realm (for Lack of Lawful Heirs of the Bodies of Prince* Edward, *and the Ladies* Mary, *and* Elizabeth) *to such Person or Persons in Remainder, or Reversion, as shall please his Highness*, &c. Now the Controversy between Dr. *Higden* and me, upon this Occasion, is, whether King *Henry* VIII. did truly observe the Direction of this Statute in his Nomination of Successors, after the Decease of his Daughters. That he was impower'd to do this by his Last Will and Testament, is not denied; and that a *Will* of his was produced and executed in some Measure, is likewise not disputed; but however the (*o*) Doctor is positive, that *Henry* VIII. *did not execute the Powers given him in Parliament, to nominate a Successor by his Last Will and Testament, sign'd with his own Hand.* And in another (*p*) Place, he affirms it with much Assurance, *That there was indeed a Will drawn for that Purpose; but it was never sign'd by the King, as the Act of Parliament expresly required*, &c. But I see no Reason for this Confidence; and I doubt not, when the Reader has well considered the following Proofs, and Arguments, he will allow, that the Authority of this *Will* is much better supported, than the Doctor is willing to believe. In order to this, I shall shew, *First*, That his *Will* was admitted, published, and executed as a Legal and Good *Will*. And, *Secondly*, That the Doctor has not produced any Objection of Weight enough to render its Validity questionable. 1*st*, I say this *Will* was admitted, published, and executed as a Legal and Good *Will*; which is evident from the undoubted Testimonies of the following Records and Histories.

(*n*) 28 Hen. 8. 7.

(*o*) *Preface to his Defence.*

(*p*) *Defence*, p. 7.

We are assured from the (*q*) Journal of the House of Lords, that on the last Day of *January*, the *Commons* being sent for to attend the Lords, the Lord Chancellor then declared King *Henry* VIII.'s Death to both Houses, in *full Parliament* assembled; and then a large Part of the said Deceased *King*'s *Will* (particularly those Clauses of

(*q*) 38 Hen. 8. Vide Appendix, n. 6.

of it, which related to the *Succession of the Crown*, and the Administration of the Government, during *Edward* VI.'s Minority) was read publickly before them, by Sir *William Paget* Secretary of State. Here then we see this *Will* is fairly laid before the Parliament, the best Judges of its Validity; and we do not find, that any Doubt arose in that Great Assembly concerning it. But on the contrary, we have the Authority of a (*r*) celebrated Historian, *That all the Executors appointed by this Will, did resolve to execute it in all Points, and to take an Oath for their faithful Discharge of their Trust.* And that *the* (*s*) *next Day the Executors did take their Oaths most solemnly, for their faithful executing the Will*; that *they order'd it also to be enrolled, and every one of the Executors was to have an Exemplification of it under the Great Seal,* ----- (*t*) *and out of Conscience to the King's Will, resolv'd to fulfill what he had intended.* Now, if we consider, who these (*u*) Executors were, and how eminent many of them were for their Integrity, as well as Quality; surely it will be hard to say, they wanted so much Judgment, as not to discern the Invalidity of this *Will*, or so much Virtue, as to execute what they knew to be a Forgery. But that I may not fail to give the utmost Satisfaction in this Question, concerning the Opinion which was entertain'd of this *Will* in *Edward* VI's Reign; I shall now lay before the Reader some remarkable Extracts from an authentick Copy of the *Council Books* of King *Edward* VI, which will fully answer my Purpose.

(*r*) *Bishop of* Sarum's *Hist. Ref.* Part 2. p. 4. B. 1.

(*s*) Ibid. p. 5.

(*t*) Ibid. p. 8.

(*u*) *See their Names at the End of the* Will, *in the* Appendix, N. 8.

(*x*) *In the Name of* God, Amen. *Where it hath pleased our late Sovereign Lord and Maister King* Henry VIII. *of most Noble and Famous Memory*, &c. *by his last Will and Testament bearing Date the* 30*th of* December, *in the* 38*th Year of his most Fortunate and Victorious Reign, to constitute and ordain us, the Archbishop of* Canterbury, *the Lord* Wriothesly *Chancellour*, William *Lord* St. John, John *Lord* Russel, Edward *Earl of* Hertford, John *Viscount* Lisle, Cuthbert *Bishop of* Duresme, *Sir* Anthony Brown, *Sir* William Paget, *Sir* Edward North, *Sir* Edward Mountague, *Sir* Anthony Denny, *Sir* William Herbert, *Knights, to be his Executors, and to be of the Privy Council with our Sovereign Lord King* Edward VI, *until he shall be of the full Age of Eighteen*, &c. *We the said Archbishop*, Thomas *Lord* Wriothesly *Chancellour*, &c. *being all assembled together in*

(*x*) *Council-Book*, Edw. 6. *Part* 1. in initio.

in the Tower of London, *the last Day of* January, *in the 1st Year of the Reign of our said Sovereign Lord King* Edward VI. *that now is, have reverently and diligently consider'd the great Charge committed unto us; and calling to Almighty* God, *the only Giver of all Grace, for his Aid and Assistance in all our Proceedings, have fully resolv'd and agreed with one Voice and Consent, not only to stand to and maintain the said last Will and Testament of our said Maister, and every Part and Article of the same, to the uttermost of our Power, Wits, and Cunnings; but also, that every of us present shall take a Corporal Oath upon a Book, for the more assured and effectual Accomplishment of the same.*

The First Day of February, *being* Tuesday, *all the said Executors before written, assembled again together in the said Tower of* London, *and there herd the Will eftsones deliberately redde from the Beginning to the Ending. And concluding, with one Voice, to adhere and stick to their Performance of it, did first take their Oaths to the King's Majesty, and after immediately sware to the due and faithful Observation of the said Will, as the Day before they had resolved.*

Wednesday, Feb. 2. Item, *The Lord Protectour and the rest of the Coexecutours then present, having the last Will and Testament of our said late Sovereign Lord deceased, made Request with oon Voice unto the Lord Chancellour of* England, *to cause the same to be Recorded and Enrolled in Forme accustomed. And thereupon each of them to have Exemplification under the Great Seal of the same, for the doing whereof the said Will was presently deliver'd by them to the said Chancellour.*

At Westminster, *the 24th of* February; *The Lord Protectour and others his Coexecutours being most desirous of their Part to see the Will of King* Henry VIII. *duly and hooly accomplished and fulfilled, as to their most bounden Duties appertaineth: For their more certain and assured Proceeding in the Execution of the same, upon mature Deliberation resolved, that before they would proceed, the hole Number of Judges, Barons of the* Exchequer, *the King's Serjeants, Attorney, and Sollicitour shall deliberately peruse the hole Will, and frankly declare their Opinion, what the Executours may lawfully do, how and in what Form the said Will might be lawfully executed and performed. Whereupon all the said Judges, &c. being called into the* Exchequer-Chamber, *after the Opening of this Resolution to them, the said Will was redde from the Beginning to the Ending; And after the same was well debated among them,*

them, it was deliver'd into their Hands to be farther consider'd accordingly: Who eftsones assembling themselves together for that Purpose, and weighing the Will and every Part of it, as appertain'd, repair'd together to the Lord Protectour, and other the Coexecutours; and then by the Mouth of Sir Edward Mountague *declared, they had throughly consider'd the said Will, and with oon Consent and Advice deliver'd their Opinion,* how that Part of the Will then in question, might be *executed*, &c.

On the 8th of *March* following, as an Instance of their great Care and Concern for this *Will, the Lord Protectour and Council thought convenient, that the Last Will of their late Sovereign Lord deceased, remaining still in the Custody of the Earl of* Southampton, *should for the more safe keeping of the same, be bestowed in the Treasury of the* Exchequer; *and thereupon did give Order to the Lord Great Master, for sending for the same, which was done accordingly; Upon Receipt whereof, about Ten of the Clock in the Forenoon, in a Case sealed, it was first opened, and eftsones sealed, and appointed to be kept till the next Day; at which time it was order'd to be deliver'd into the said Treasury by the Hands of Sir* John Godsalve *Knt. to the Custody of the Officers of the said* Exchequer.

Sign'd, E. Somerset, T. Cant. W. St. John, J. Russel, J. Warwick, Anth. Brown, Ant. Denny, W. Herbert.

Wednesday the 9th of *March. According to the former Order, this Day about Nine of the Clock in the Morning, the last Will of our said late Sovereign Lord deceased, was deliver'd by the Hands of the Lord Protectour, in presence of the rest of the Council, to Sir* John Godsalve *Knt. who repairing with the same to* Westminster, *and bestowing in the Place of the Treasury, where he alledged the Last Will of* Henry VII. *to remain, brought for Testification of the Delivery thereof, a Bill written in Parchment, subscribed with the Hands of* Thomas Danyel, William Walters, *and* John Lambe, *Officers of the said* Exchequer. These certainly are such Marks of Respect and Reverence, as could not possibly be paid to a *Will*, the Validity of which was in the least suspected.

In the Year 1549. King *Edward* VI. having been conveyed by the Duke of *Somerset* to *Windsor*, by Violence, as was pretended; the rest of the Privy Council, remaining in *London*, wrote a long Letter of Complaint

to the King, against the said Protector, dated 19th *October*; in which were the following Passages: *We trust, that your Highness of your Goodness will, without any Jealousy or Suspicion, think that most expedient, both for your own most Royal Person, and all your Subjects, that by the Body of your Council may be thought expedient; to whom, and to no one Man, your Highness most grave Father appointed, by his Last Will and Testament, the Care of your Majesty, and all your most weighty Affairs. ----- For the End of this Matter touching the Duke of* Somerset; *if he have that Respect to your Majesty's Surety, that he pretendeth; if he have the Consideration of his Duty to* God, *that his Promise and Oath requireth; if he have that Remembrance of the Performance of your Majesty's Father's Will, that to the Office of a Good Executour appertaineth,* &c: *Let him first suffer us to be restored to your Majesty's Presence,* &c. ----- *The Protectourship and Governance of your most Royal Person, was not granted him by your Father's Will; but only by Agreement, first amongst us the Executours, and after of others; Those Titles and special Trust was committed to him during your Majesty's Pleasure, and upon Condition he should do all things by the Advice of your Council,* &c.

Subscribed by the Lord Chancellour, the Lord Great Master, the Lord Privy Seal, the Lord Marquis of Northampton, *the Lord Great Chamberlain, the Earl of* Shrewsbury, *the Earl of* Southampton, *the Lord* Wentworth, *Master Treasurer, the Master of the Horse, Master Vice-Chamberlain, Sir* John Gage, *Mr. Secretary* Petre, *Sir* Edward North *Lord Chief Justice, Sir* Ralph Sadler, *Sir* John Baker, *Sir* Edward Wotton, *Mr. Dr.* Wotton, *Sir* Richard Southwell, *Sir* Edmund Peckham.

In the 4th Year of this Reign *Stephen Gardiner* Bishop of *Winchester* was brought into Trouble for some Misdemeanours laid to his Charge; in which Prosecution the following (y) Interrogatories, among many others, were put to the Lords of the Privy Council, *&c.*

(y) *These Interrogatories with the Answers to them are only to be found in the first* English *Edit. of* J. Fox's Acts *and* Mon. p. 793.

1. *Whether you know, or have heard say, that the late King of famous Memory, willed him the said Bishop of* Winchester, *no more to be of the Privy Council with the King's Majesty our Sovereign Lord that now is; and omitted and expresly refused to have him named among other Councellours in his Testament, to be of the Council aforesaid.*

2. Item,

2. Item, *Whether ye know or have heard say, that the said Bishop, being aforenamed as an Executour in the Testament of the said late King, was a little before his Death, at his Declaring of his Last Will, put out by his Highness, and so by him refused to be any of his said Executours*, &c.

To these Interrogatories the Lord *Paget* answer'd as follows.

(z) *Touching the late King's putting the Bishop of* Winchester *out of his Testament; it is true, that upon St.* Stephen's *Day at Night, four Years now past, his Majesty having been very Sick, and in some Peril, after his Recovery forthwith called for the Duke of* Somerset's *Grace, for the Lord Privy Seal, for my Lord of* Warwick, *for the late Master of the Horse, for Master* Denny, *for the Master of the Horse that now is; and for the said Lord* Paget, *at that Time his Secretary: And then willed Master* Denny *to fetch his Testament. Who bringeth forth first the Form of a Testament, which his Majesty liked not, after he heard, saying, that was not it, but there was another of a latter Making, written with the Hand of the Lord* Wriothesly *being Secretary. Which when Master* Denny *had fetched, and he heard it, he seem'd to marvaile, that some were left out unnamed in it, whom he said he meant to have in, and some in, whom he meant to have out; and so bad the said Lord* Paget, *in the Presence of the foresaid Lords, to put in some, that were not named before, and to put out the Bishop of* Winchester's *Name, which was done. And then after his Pleasure declared in sundry Things, which he caused to be alter'd, and enter'd in the Will; his Majesty came to the naming of Councellours Assistants to his Executours. Whereupon the said Lord* Paget, *and the others, beginning to name my Lord Marquis of* Northampton, *my Lord of* Arundel, *and the rest of the Council, not before named as Executours; when it came to the Bishop of* Winchester, *he bad put him out, saying, he was a Wilful Man, and not mete to be about his Son, the King's Majesty that now is. Whereupon we passed over to the Bishop of* Westminster, *whom his Majesty bad put out also; saying, he was scholed, or such like Term, by the Bishop of* Winchester. *And so passing unto the rest, he admitted all of Council without Stop, saving one other Man, at whom he made some Stick, but nevertheless upon our Suites relented; and so he was named as a Councellour. This all done, the said Lord* Paget *read over to his Majesty, what was written, and when he came to the Place of Councellours, reading their*

(z) J. Fox, ibid. p. 815. *1st Edit.*

their Names, he began to move the King again for the Bishop of Winchester; *and the rest then present set Foot in with him, and did earnestly sue to his Majesty for placing the said Bishop among the Councellours; but he would in no wise be entreated, saying, he marvelled what we meant, and that all we knew him to be a Wilful Man.*

(a) J. Fox, ibid. 1st Ed. p. 819.

THE Duke of *Somerset* likewise (a) deposes, That *Henry* VIII. *would not suffer the Bishop of* Winchester *to be named as Executour or Councellour in his Testament, tho' moved to it by Sir* Anthony Brown, *the Duke his Grace, the Earl of* Warwick, *the Lord Privy Seal, the Lord* Paget, *Mr.* Herbert, *and other being present.*

(b) J. Fox, ibid. p. 820.

THE Earl of *Wiltshire* High-Treasurer of *England*, being examined, (b) deposeth, *That he was present at the Opening of the late King's Majesty's Will, and found not the Bishop of* Winchester *named there, either amongst the Executours, or Councellours.*

(c) J. Fox, ibid. p. 829.

Cuthbert Bishop of *Duresme*, being examined, (c) deposeth, *That he did not know, that he himself was named Executour, unto such time, that the King was dead: Nor did not know, that the Bishop of* Winchester *was left out, till he heard the Testament redde, after the King's Death.*

FROM which Passages it is observable, *First*, That the *Will* mention'd in these Depositions, in which the Bishop of *Winchester*'s Name was omitted, was that very *Will*, which was executed as the Last *Will* of King *Henry* VIII. *Secondly*, That King *Henry* VIII. for above a Month before his Death, took great Care in settling this *Will*, in a very deliberate manner; for it appears from the Lord *Paget*'s Depositions, that he sent for that particular Copy of it, which he best liked; that it was read over to him, and several of his *Privy Council*; and that he then declared *his Pleasure in sundry Things, which he caused to be alter'd, and enter'd into the Will*; And lastly, *that all these Alterations were read and approved of by him.*

BUT if after all, this *Will* was no better than a *Forgery*, how came *Stephen Gardiner* Bishop of *Winchester*, a Person of great Experience, Knowledge, and Sagacity, who was disgracefully excluded out of the Number of the *Executors, and Councellors*, and therefore would have been pleased with an Opportunity of invalidating the *Will*, if it was possible; how came that Bishop, I say, instead of urging any Objections against its Authority, (which he

was

was sufficiently provoked to do) to presume to appeal to this very Will, against the Power exercised by the Duke of *Somerset* as *Protector?* Which yet it is very evident, he does, in the Place cited in the (*d*) Margin.

LASTLY, When Archbishop *Cranmer* was earnestly solicited to subscribe to the Order of Succession appointed by *Edward* VI, we are (*e*) assured, he refused to do it for some time, upon this only Reason; *viz. because he had sworn to* Henry VIII.'*s Will*; to which the rest of the Privy Council return'd no other Answer, but this; *That they had done the same, and had as tender Consciences as himself.* A good Proof, that neither the *Archbishop*, nor any other of the *Privy Council* knew, at that time, of any just Objection, that could be made against the *Will* of *Henry* VIII; for it is not to be imagined, such an Opportunity would have been neglected, of removing his *Grace*'s Scruples, had it been then known, that the said *Will* was liable to any reasonable Exceptions. So that we have the fullest Evidence that can be desired, that during the whole Course of King *Edward*'s Reign, this *Will* was esteemed of unquestionable Validity; at least I may venture to say, there is nothing appears, either in the Records, or Histories of those Times, that can in the least countenance the Suspicion of its wanting any of the Requisites of a Legal *Will.*

KING *Edward*'s Death was no sooner known to Queen *Mary*, but she (*f*) claims the Crown, *as well by the Testament and Last Will of her dearest Father, as by Act of Parliament:* An Error she could not possibly have fallen into, had either her Friends, or her Enemies entertained the least Jealousy of her Father's *Will.* And the Truth is, if any Controversy ever arose upon this Subject; or it became a Matter of Doubt, in the *Courts of Judicature* or elsewhere, in any Time of this Reign, whether *Henry* VIII.'s *Will* was genuine and valid; our Memoirs and Histories are extremely defective, in concealing so important a Piece of Knowledge from us.

WE do not find indeed, that Queen *Elizabeth* did so much Honour to her Father's *Will*, as publickly to found

(*d*) J. Fox's *Acts and Monuments*, 1*st* Engl. *Edit.* p. 795.

(*e*) J. Strype's *Memorial of Archbishop* Cranmer.

(*f*) *See her Letter from* Keninghall *in* Norfolk, *to the Privy Council.* J. Fox's *Acts and Monuments*, *and* Holinshead's *Chron.* p. 1084.

her Right of Succeſſion, in any Meaſure, upon it: But we are well aſſured, that ſome of her beſt and moſt knowing Subjects were of Opinion, that her Title from it deſerved very well to be inſiſted on; which ſufficiently demonſtrates, that the Authority of this *Will* was then thought very good and effectual. Biſhop *Jewell*'s Teſtimony, I believe, will be admitted, as credible for this Purpoſe; which may be found in his *View of a Seditious Bull*, (p. 13.) in the following Words: *Was not the Crown of* England *due to Queen* Elizabeth *by Inheritance, and by Succeſſion, and by the Laws of this Realm? Did not her Father warrant it to her by Will, as to his Daughter? Did not Queen* Mary, *by expreſs Words, leave it to her, as to her Siſter? Did not the whole Nobility of the Realm confirm it? Did not Queen* Mary's *Biſhops kneel down before her, and acknowledge her to be their Natural and Lawful Queen*, &c?

But notwithſtanding all theſe Evidences, the Doctor tells us, that many and weighty Objections were long ſince made againſt this *Will*, which to him ſeem unanſwerable. Let us now therefore conſider theſe mighty Objections, and ſee whether they ſo well deſerve his good Opinion. It is not pretended, that any of theſe Objections appear'd publickly in Writing, till Queen *Elizabeth*'s Reign; and even then, I believe, it will not be found, that any *Engliſh* Subject had the Confidence to give them Countenance. The Truth is, the *Scotch* Nation was highly offended with this Will, for Excluding the Iſſue of their Queen *Margaret* from the Succeſſion to the Crown of *England*; and therefore, when they found the Right of the Houſe of *Suffolk* openly aſſerted, which was done by one (g) *John Hale*, in a particular Diſcourſe written expreſly for that Purpoſe; they thought it then became their Zeal for the Intereſt of their *Royal Family*, to enquire into the Validity of *Henry* VIII.'s *Will*, upon which the oppoſite Title wholly depended: And the Iſſue was, that at length they fancied, they had made very happy Diſcoveries, which would be ſufficient entirely to overthrow its Authority. What Arguments they thought proper to make uſe of upon this Occaſion, they were very forward to publiſh; and we meet with them frequently in ſeveral printed Books of Queen *Elizabeth*'s Reign; and therefore, I confeſs, it was Matter of ſome Surprize to me, to find ſo knowing an Hiſtorian as the Biſhop

(g) *His Book was written in the Year* 1563.

Bishop of *Salisbury*, reciting the common Objections against this *Will* out of a Manuscript Letter, as a Secret, which he alone had the Happiness to discover, (*h*) and *which had been hitherto unknown:* Whereas there is not one Circumstance in all that he has said upon this Occasion, but has been more fully urged and represented in the *English* and *Latin* Editions of the *Defence of* Mary *Queen of* Scots, (*i*) written by *John Lesley* Bishop of *Rosse*, by the *Jesuit Parsons in* Leicester's *Commonwealth, and his Conference about the Succession*; not to mention *John Colvill*'s *Palinode*, and another Pamphlet, entituled, *A Treatise declaring and confirming against all Objections, the Just Title and Right of the most excellent and worthy Prince K.* James VI, printed, as I guess, not long before Queen *Elizabeth*'s Death. These Books being thus published in that Queen's Reign, and dispersed throughout the Kingdom, are a sufficient Proof, that his Lordship had no Need to have Recourse to a Manuscript Letter, to furnish himself with Arguments against King *Henry*'s *Will*. What these Arguments were, and how well they deserve that Name, I now proceed to examine: And though the Doctor has obliged me to consider them only, as they lie in *Leithington*'s Letter, and Sir *Thomas Craig*'s Book of the Right of Succession; yet I shall be so just to his Cause, as to give them all the Advantage they are capable of, from the Books before-mention'd.

(*h*) *Hist. Reformat.* Part 1. B. 3. p. 349.

(*i*) *The* English *Edition was printed in* 8vo. Anno 1569, *at* London. *The* Latin *was printed at* Rheims *in* 4to. Anno 1581.

1. It is suggested by *Leithington*, and Sir *Thomas Craig*, that this *Will* of *Henry* VIII. was not signed with his *own Hand*, but only with his *Stamp*, and therefore was not good in Law; for the *Acts of Parliament*, which impower'd him to limit the Succession by his *Last Will and Testament*, obliged him to sign it with his *own Hand*; which not being performed, the *Will* was of no Authority.

To this I answer, *First*, That it cannot well be thought the Intention of those Acts of Parliament, to restrain the King from signing his *Will* with his *Stamp:* And, *Secondly*, That the Law looks upon any thing that is signed with the King's *Stamp*, as of equal Authority with that which is signed with his *Hand*.

First, I say, that it cannot well be thought the Intention of those Acts of Parliament, to restrain the King from signing his *Will* with his *Stamp*. For from what

Cause

Cause soever it might proceed, it is certain, that before the Passing of this last Act of the Succession, the King generally made use of his *Stamp* upon all Occasions; and whatever was thus signed, was universally receiv'd, and allowed to be effectual to all Intents and Purposes, as if the Letters of his Name had been particularly and expresly formed by his own Hand. I have seen the *Council-Books* of the 33d and 34th Years of his Reign, in which a great Number of Commissions and Warrants are mention'd to have had no other Authority, but his *Stamp*; and it is well known, before that time he seldom gave himself the Trouble of using a Pen. It was undoubtedly therefore more for his Ease and Satisfaction, to be left still to his Liberty of making use of his *Stamp*, as he had accustomed himself to do; and we are well assured, his Parliaments had too much Complaisance for him, to cross him in any of his Inclinations.

But, *Secondly*, The Law makes no Distinction between a *Will* signed with a *Stamp*, and the same Person's own Hand; but looks upon the former as of equal Authority with the latter. This we are sure is true in the Case of private Men; and that it also holds good in the Question now before us, we have the Judgment of *Henry* VIII.'s last Parliament; for the Commission, by which the Duke of *Norfolk*'s Attainder was passed, was sign'd only by the King's *Stamp*; and yet the Act of Parliament, which enabled the King to pass Acts by Commission, (*k*) says expresly, *that it should be sign'd with his Hand.* This plainly shews, that whatever was sign'd by the King's *Stamp*, was, in the Opinion of that Parliament, signed with his Hand; and therefore the *Journal of Parliament*, when it mentions that Commission, says, it was signed (*l*) *Signo manuali Regis.* It may indeed be suggested, that for this very Reason the Attainder of the Duke of *Norfolk* was reversed in the First Parliament of Queen *Mary*'s Reign; *viz.* (*m*) because the Commission, by which that Attainder was passed, was signed by the King's *Stamp, and not his Hand.* But we have a later and more

(*k*) 33 Hen. 8. c. 21.

(*l*) Les Lettres Patents purport le signe Henry Rex Manuel del Roy. Vide Dyer's *Reports*, Term. Mich. An° 1mo Mariæ.

(*m*) Vide *Journal Parl.* 1mo Mariæ, *and Bishop of* Sarum's *History of the Reformation*, Part 2. p. 257. B. 2. *and* Dyer's *Reports*, Term. Mich. 1mo Mariæ.

remark-

remarkable Judgment given in Parliament, which may justly be thought sufficient to determine this Controversy; and that was in the Case of the Act, which appointed the *Abjuration* Oath, and also the *Malt* Tax, (if I mistake not) which were both passed by a Commission signed only by King *William*'s *Stamp*, the Day before he died. Will the Doctor now say, these Acts were of no Authority, and that whatever was done pursuant to them, was contrary to Law? I am persuaded, he will not own this to be his Opinion. But if he will allow the *Stamp* of a King to be of sufficient Authority in a Commission of this High Nature; he will be very hard put to it to prove, that it is of no Force in the present Question.

2. It is said, this *Stamp* was not set to the *Will* by the King himself, nor by his Order; but *that after the King had lost the Use of his Reason, or was past Sense and Memory, one* William Clark *put the Stamp to it; which was acknowledged by the said* Clark *openly before Queen* Mary *and her Privy Council, and also the Parliament. And this was likewise attested in Parliament in Queen* Mary*'s Time, for the Restitution of the Duke of* Norfolk, *by the Lord* Paget. This we find affirm'd in *Leithington*'s Letter, and Sir *Thomas Craig*'s Book of the Succession; and the (*n*) Bishop of *Rosse* is not only positive in these Points; but adds some farther Particulars in the Passage immediately following. *We say then, that the King never signed the pretensed Will with his own Hand; neither do we say it by bare Hearsay, or gather it by our former Conjectures and Presumptions only; but by good and able Witnesses, that avouch and justify of their own certain Knowledge, that the* Stamp *only was put to the said Will, and that even when the King himself was now dead or dying, and past all Remembrance. The Lord* Paget *being one of the Privy Council with Queen* Mary, *of his own free Will and godly Motion, for the Honour of the Realm, for Reverence of Truth and Justice, tho' in the Fact himself culpable, and in a manner thereto by great Authority forced; did first of all Men disclose the Matter, first to the said Council, and then before the whole Parliament. Sir* Edward Mountague *also, the Chief Justice, that was privy and present at the said Doings, did confess the same, as well before the Council, as before the Parliament. Yea,* William Clark, *ascribed among other pretensed Witnesses, confessed the Premises to be trewe, and that himself put the* Stamp *to the said Will, and afterward purchased his Charter of Pardon for the*

(*n*) *Bishop of* Rosse*'s Defence of Queen* Mary*'s Right to the Crown of* England, *Book* 2. p. 98. *Engl.* 8°.

the said Fact. Upon which Depositions well and advisedly weighed and ponder'd, Queen Mary, *with the Advice of her Council, to the Honour of* God *and the Realm, to the Maintenance of Trewth and Justice, and the Rightful Succession of the Crown, for the eschewing of many fowl Mischiefs, which might upon this Forgery ensue, caused the Record of the said forged Will, remaining in the Chancery, to be cancelled, defaced, and abolished, as not worthy to remain among the trew and sincere Records of this noble Realm.* And to the same Purpose writes the Author of the Treatise, *Declaring the Right and Title of King* James VI. *to the Crown of* England, which I had before mention'd. Now it must be confessed, these *Facts* are considerable, and would be of great Weight, in putting an End to this Dispute, could they be well proved: But I shall now shew, that some of them are false, and the rest depend upon too slight an Authority to be credited.

First, I say, some of these Passages, which are related as certain Matters of Fact, are false. It is not true, that *Henry* VIII. was *dead*, or *dying*, or past *Sense* and *Memory*, when the Stamp was set to his Will: For this was done on the Thirtieth of *December*, which was a full Month before he died; and it appears from the Lord *Paget*'s Deposition, (before cited) that there was no Part of this *Will*, which had not been duly and maturely consider'd by the King, while he had the perfect Use of his Understanding, four Days before it was sign'd.

Secondly, That the *Stamp* was set to this *Will* by one William Clark, *without the King's Order*, &c. is said without any manner of Proof by these Writers. And surely, in a Matter of this Consequence, they will not take it ill, if their bare Word is not admitted for Evidence. They tell us indeed, that my Lord *Paget* declared before the Council and Parliament, in the First of Queen *Mary*, upon the Occasion of the *Restitution* of the Duke of *Norfolk*, that the *Stamp* was set to this *Will* by *William Clark*, &c. But what Evidence is there for this? We have neither Record, nor History, no printed Book or Manuscript, besides what has been written by Gentlemen of the *Scotch* Nation, that affirms any thing of this Matter. What Occasion could my Lord *Paget* have, to mention the *Will* of *Henry* VIII, when the Duke of *Norfolk*'s Attainder came under the Consideration of the Parliament?

What

What Relation had they one to another? Besides, this Lord was the first, that produced this *Will*, and read it in open Parliament, as undoubted and genuine: He swore, as an Executor, to perform it; and all along acted in that Trust, as one that believed it of unquestionable Authority; and all this I have proved from unconteſtable Records. Is it reasonable therefore to believe, that a Person of his Quality and Character, would have acted so base and dishonourable a Part? Does it any where appear, that he ever retracted his first Evidence? Or if he did, ought not a Matter of such Consequence to be as well attested, as what he had declared before in Favour of the *Will?* But nothing Satisfactory in this respect has yet been produced: Indeed the Adversaries to this Will have been bold enough to insist upon such a Retractation of the Lord *Paget*; and have also been vain enough to expect, it should be admitted as an undoubted Matter of Fact: But the World is not yet so complaisant, as to give Credit to the bare Affirmations of a Party, supported by no plain and legal Proofs; and therefore till we are better assured of the Truth of their Assertions, we must beg Leave to look upon them as unworthy of any Regard or Countenance. Surely, such important Transactions, had they ever had an Existence, might have been demonstrated from some authentick Instruments, preserv'd among the publick Records; and it is not easy to imagine, that the *Journals* of Parliament, and Council-Books, should pass them by without any manner of Notice; and yet we know, that nothing of this Nature is to be found in those Writings. After all, if it could be proved, that the Lord *Paget* did give in the Evidence pretended, in Queen *Mary*'s Time, it may very well be a Question, whether this could be of Weight enough to overthrow the Credit of his former Depositions, in Favour of the said *Will*: For the Bishop of *Rosse* himself (*o*) confesses, *That if any such Witness, or Executor, had upon his Oath before a Lawful Judge, deposed, of his own certain Notice and Knowledge, that the said Will was signed with the King's own Hand; in case he should afterwards contrary and revoke this his solemn Deposition, it ought not lightly to be discredited, for any such Contradiction afterward happening.* But I have fully shewed, that this Lord *Paget* did in King *Edward* VI.'s Reign, upon several publick Occasions,

(*o*) *Defence of the Title of* Mary *Queen of* Scots, English 8°. B. 2. p. 101.

Occasions, manifest his Belief, that *Henry* VIII.'s *Will* was good and genuine.

What has been said against this imaginary Retractation of the Lord *Paget*, may equally serve, as an Answer to the Surmise, that *William Clark*, and the Lord Chief Justice *Montague*, did likewise appear as Witnesses against this *Will*: For all this is affirm'd without any manner of Proof; and is a Piece of History no where to be met with, but in those few *Scotch* Writers abovementioned; who were indeed truly worthy of Commendation, for the Fidelity and Zeal they shew'd in their Mistress's Cause; but were undoubtedly imposed upon in these Particulars. For surely it is a very dishonourable Reflexion on Sir *Edward Montague*'s Memory, to say, he rejected the Authority of this Will in Queen *Mary*'s Days, who was sworn to it in *Edward* VI.'s, and took Care to see it executed; and also upon a serious and deliberate Perusal of it, with the rest of the Judges, gave his Advice, how some particular Parts of it might best be performed, as I before observed out of King *Edward*'s Council Book. These Actions were manifest Indications, that he did not then suspect the Authority of King *Henry*'s *Will*; unless we are to suppose, he acted against his Opinion and Conscience, which we ought not to be easily prevail'd with to believe.

After all, I am sensible, I have not yet satisfied Doctor *Higden*; for he (*p*) tells us, *That what* Leithington *says, carries the greater Weight; because he appeals for the Truth of it, not only to Sir* William Cecill, *the Minister of State to whom he writes; but to several Noblemen then alive, who could not but know, whether what he affirms to have been done in open Parliament twelve Years before, was really done or not*, &c. Admirable Reasoning! I doubt not but Sir *William Cecill*, and the Noblemen appeal'd to in that Letter, did know, whether what was affirm'd there was true; but certainly it was no Argument it was so, because *Leithington* might easily have been confuted, if it had been otherwise: For surely Men may be confident in their Mistakes, and assert Things boldly against Truth, and yet be so despised, as to be thought unworthy of a Confutation. I am confident, this is the true Reason, that so little Notice has been hitherto publish'd, of the many *notorious Falshoods*, that fill almost every

(*p*) *Defence*, p. 9.

Page of the Reigns of King *Charles* II, and King *James* II, in the Third Volume of *The Complete History of* England: And yet, for fear that the eſtabliſh'd Reputation of the Hiſtories publiſh'd with it, in the Firſt and Second Volumes of this Collection, and the Bulk of the Whole, conſiſting of three large Volumes in *Folio*, ſhould gain it any Credit in the next Age, as much as it is deſpiſed in this; and what is now known to be wholly owing to the general Contempt of the Book, ſhould then by ſome Doctor *Higden* be improv'd into an Argument of its Authority; there is an *Examen Hiſtoricum* of it now preparing for the Preſs, by a (*q*) great Man, that had himſelf no inconſiderable Share in the Publick Affairs of the Time he writes of, and was an Eye-Witneſs of many of the Falſhoods publiſh'd in this Third Volume of our *Complete Hiſtorian*. But to return to Doctor *Higden*. How does he know, that Sir *William Cecill*, and other Noblemen appealed to, did not ſhew Secretary *Leithington* his Errors in the ſeveral Points inſiſted on in his Letter? I rather believe indeed, that they did not do him the Honour to undeceive him in thoſe Particulars: For Queen *Elizabeth* and her Miniſters thought it a Piece of Wiſdom (for many Years of her Reign) to conceal her Reſolutions about her Succeſſor; and therefore none about her were permitted to enter into Debates about the next Title after her Deceaſe. But however that might have been, it is ſufficiently evident, that Secretary *Leithington* was miſinformed in ſome Particulars, which he mentions in his Letter; for when *he leaves it to ſuch, as are to claim after the Iſſue of* Henry VII, *to lay in Bar the Polygamy of* Charles Brandon *Duke of* Suffolk; I muſt take the Liberty to charge him with a ſcandalous and unpardonable Defamation of that Noble Peer: That this Duke of *Suffolk* had another Wife living at the Time of his Marriage with *Henry* VIII.'s Siſter, was indeed a Calumny too much credited by the Friends of the *Stuart* Family, in the Beginning of Queen *Elizabeth*'s Reign; but it was ſo groundleſs a Calumny, and ſo eaſily confuted, that the World was ſoon convinced of their Error, in giving it

(*q*) *The Learned Author of the* Reflexions on ſome Paſſages in Mr. *Le Clerc*'s Life of Mr. *John Locke*, *in the* Preface *to which he has already oblig'd the World with a Specimen of the Unfaithfulneſs and Prevarications of this Pretended* Complete Hiſtorian.

any Countenance; insomuch that when the Bishop of *Rosse* wrote his *Defence of* Mary *Queen of* Scots *and her Title*, he was ashamed of so notorious a Falshood, and therefore refused to allow it any Place among his Objections against the House of *Suffolk*; which, had the Story been true, would have been of great Use and Service to him. And it deserves to be taken Notice of, that this Slander was never after revived by any Writer of Queen *Elizabeth*'s Reign, (as far as I have been able to discover) till Father *Parsons* the *Jesuit* publish'd *Leicester*'s *Commonwealth*, and his *History of the Succession*; in which Piece, he thought it became him to omit none of those scandalous Aspersions, which might help to create an Aversion to the Families of *Scotland* and *Suffolk*, that he might the better advance the Interest of the Court of *Spain*. In our Days indeed an eminent Writer has very surprizingly, by an unfortunate Slip of his Pen, rescued this Calumny from Oblivion, and given it a fresh Currency in his celebrated History. *I have seen it often affirm'd* (says this great (*r*) Author) *in many Letters and Writings of that Time, that all the Issue of* Charles Brandon *was illegitimated, since he was certainly married to one* Mortimer, *before he married the Queen of* France; *which* Mortimer *lived long after his Marriage to that Queen; so that all her Children were Bastards. Some say he was divorced from his Marriage to* Mortimer; *but that is not clear to me.* I know not how it came to pass, that his Lordship's usual Tenderness for the Honour of *Henry* VIII. did not a little restrain him from so readily giving his Assent to so suspicious a Piece of History; for undoubtedly it may be reckon'd among the great Blemishes of his Reign, that he match'd his Sister to a Person, who had a Wife then living. Besides, had his Lordship been at Leisure to reflect thorowly upon this Passage, before it fell from his Pen, he would undoubtedly have found it difficult to believe, so remarkable an Occurrence could have been, either a Secret to all our *English* Writers, or omitted by them, had it been known. And, *Lastly*, It is Pity his Lordship did not consider, how many (*s*) Noble

(*r*) *Bishop of* Sarum's *History of the Reformation*, Part 2. B. 1. p. 176. *See also* Part 2. B. 2. p. 236. *of that History.*

(*s*) *It may not be unacceptable to the Reader to be informed, who the principal Noblemen are, who have the Honour to be descended from the Duke of* Suffolk, *and*

Families

Families are injured, if what he has affirm'd should prove untrue; for it is not to be imagin'd, they should be insensible of the Honour of deriving a Legitimate Descent from the Sister of so great a King. I proceed now to shew, that I have not without Justice question'd this Part of his Lordship's History; which I am persuaded will be done effectually by the following Extract out of a Manuscript Discourse, written by Mr. *John Hale*, in the Year 1563.

Against these Heirs of the French *Queen it is objected, that they were not lawfully born; but verily this is a mere Slaunder, growen altogether upon Malice, and no Accusation made upon any just Presumption. For I beseech you tell me, is it like, or can any reasonable Man think, that if Duke* Charles *had had another Wife living, when he married the* French *Queen; that King* Henry *would have consented, that his Sister should have receiv'd so great Injury, that she should have been kept like a Concubine? Would his Council have suffered so great an Infamy to have come to his Majesty's Stock? Or would the Nobility of the Realme with such Triumph have honoured so unlawfull an Act? Wou'd the Common People, who many times be ready to speak Evill of Well-doing, have holden their Tongues in so manifested Adultery? Is it like, that in so long time, that the* French *Queen and the Duke lived together as Man and Wife, (that was all the Life of the* French *Queen) she should not have heard of it? Was it possible, that amongest so many Women, which dayly resorted to her, none would have told her of it? Or is it to be believ'd, that she, contrary to the Nature of all other Women, would have been contented, that another should have been Partaker of that Flesh, which she according to* God's *Word took only to be her own? Or can any Man think, that any Woman can be contented to live in mean*

the French *Queen; and therefore I shall here set down their Names in their Order, as they occurr to my Memory. The first of this House of* Suffolk, *now living, is the Lord* Bruce (*Son to the Earl of* Ailesbury) *and his Sister the Countess of* Cardigan; *then follow the late Earl of* Winchelsea's *Sister, the Right Honourable* Heneage, *the present Earl of* Winchelsea; *all the Issue of the Lady* Frances, *late Viscountess* Weymouth; *the Earl of* Burlington, *and the Issue of his Father and Grandfather; the Children of the late Duchess of* Queensborough, *and the present Duke of* Somerset! *All these are lineally descended from* Charles Brandon *Duke of* Suffolk, *and the* French *Queen, by their eldest Daughter* Katharine. *And it is also well known, that the Earls of* Derby, *for several Successions, reckon'd it as one of the noblest Instances of their High Extraction, that they sprung from the Lady* Eleonore, *youngest Daughter to the forementioned Duke and Queen. So that the several Branches descended from them, would be too numerous to be easily called to Mind, and would take too much Room to be here mention'd.*

Degree,

Degree, when she may be a Dutchess, as the Lady Mortimer *might have been justly, if she had been the Duke's Wife? Surely there is no Reason to make any Man to think so; then much less to report so. But suppose, that the Duke had had another Wife living, at that time he marryed the* French *Queen; yet forasmuch as He and She were marryed together openly, continued all their Lives as Man and Wife together, and nothing said against them; and every Man took them for Man and Wife; and that the Lady* Frances, *and the Lady* Elianor *were not taken to be Bastards during their Lives: Now after their Death neyther they nor their Children may, by the Laws of this Realme, be accounted so.* Nec justum aliquando mortuum facere Bastardum, qui toto tempore suo tenebatur pro legitimo, *as appeareth by a Judgement given at* Westminster *in* 13° Edw. 3tij.

But for the Declaration of the Truth of this Matter, and to putt out of the Heads of the People this fond Opinion and Talk, which is only moved of Malice, and cometh not of any certain Knowledge; and encreased by light Credit without Consideration; and mayntained by such as no doubt pass so much upon the Trueth, as desirous to satisfie their froward Affections.

You shall understand, that the Duke of Suffolk, Charles Brandon, *being in the Court, living sole and unmarryed, made a Contract of Matrimony with one Mrs.* Ann Browne. *But before any Solempnization of Marriage, not only had a Daughter by her, (which after was marryed to the Lord* Powis) *but also brooke Promise with her, and openly and solemply marryed with the Lady* Mortimer; *which Marriage the same Mrs.* Ann Browne *judicially accused to be unlawfull; for that the said Sir* Charles Brandon *had not only made a Præcontract with her, but also had carnally known her. Which things being duly proved, and Sentence of Divorce, between the said Sir* Charles *and the Lady* Mortimer, *given and denounced, he marryed solemnly the said Mrs.* Ann Browne: *At the which Marriage all the Nobility were present, and did honour it. And afterwards the said Sir* Charles *had by the same Mrs.* Ann Browne, *another Daughter, which was marryed to the Lord* Mounteagle. *After this, the said Mrs.* Ann Browne *continewed with him all her Life as his Wife, and dyed his Wife without any Impeachment of the Marryadge. After whose Death, King* Henry *having him in great Favour, intended he should for his better Preferment have marryed the Lady* Lisle, *being a young Mayd, an Inheritour. Whereupon the*

the said Sir Charles *was created Viscount* Lisle: *But that Marriadge by reason of her Youth took no Place. After this he was created Duke of* Suffolk, *about the which Time* Lewis *the* French *King dyed; and leavyng the said Lady* Mary *(Daughter to King* Henry VII.*) Widow; the sayd* Charles *Duke of* Suffolk *was sent into* France *for her, and with the Consent of* Henry VIII. *married her twice, first secretly in* France, *and after openly here in* England, *(as before is declared) and so they lived together all their Lives long as Man and Wife, and were so accepted and taken of all Parts, and no Person impugning or gainsaying of the same; for there was no just Cause. After this they had Issue between them; that is, the Lady* Frances, *and the Lady* Elianor.

Against whom the Lady Powes, *their Base Sister, in the Time of King* Edward VI. *alleged Bastardy; but yet notwithstanding that, they were both by the Laws of the Realme, and by the Canon Laws declared to be legitimate, and approved to be born in Lawfull Matrimony, so as no Man can say, they be Bastards. And if that they cold, yet at this present, because it was adjudged for them, that it was not so; and also for that they both be dead, and dyed taken as Legitimate; he ought not to be heard by Order of any Law in the World, if he wold object it against them.*

THUS did this Gentleman long since wipe off the Aspersion cast upon the Issue of *Charles Brandon*, and the *French* Queen; to which it does not appear, that any Reply was ever made; and it certainly had that Effect, that the Bishop of *Rosse*, and others the most Learned Assertors of the Title of the House of *Scotland*, never afterwards thought fit to urge this Objection. *Leithington* indeed, and *Parsons* have had so little Modesty, as to repeat this Calumny, at the same time that they confess, they had seen this Discourse of Mr. (*u*) *Hales*; but neither of them has pretended to shew, that he had misrepresented the Fact, or departed in the least from Truth in the Relation of it.

(*u*) *In* Leithington's *Letter his Name is printed by a Mistake* J. Halle, *instead of* Hales.

IT may be farther observed, that *Henry* VIII. expresly provides in his *Will*, that the Heirs of the Lady *Frances* and *Eleanor* (to whom the Crown was to descend after his Daughter *Elizabeth*) should be *lawfully begotten*; a Qualification, which therefore he may be supposed to have believ'd, was not Wanting in their *Mothers*. But if any should be so contentious, as to disallow of this Conse-

quence; or so difficult to please, as still to question, whether the Legitimacy of the Children of the Duke of *Suffolk*, and the *French* Queen, is sufficiently proved; they may enjoy their Humour, without any real Prejudice to the Issue of the Lady *Frances* and *Eleanor*, who had undoubtedly a good Title by this *Will*, whatever the Birth of their *Mothers* might have been.

ANOTHER Objection against this *Will* is, *That the Original had been embezzled, and was not to be found.* This is urged by *Leithington*; and (*x*) the Bishop of *Rosse* frequently challenges the Advocates of the House of *Suffolk* to produce it; and even Mr. *Hales* himself (*y*) was of that Opinion, that it was destroyed in Queen *Mary*'s Time, by the Enemies of the Protestant Religion. But they were all extremely mistaken; for the (*z*) *Original Will* is still extant, and may be seen in the *Chapter-House* at *Westminster*: It was first indeed reposited, by (*a*) Order of Council, in the *Treasury* of the *Exchequer*; where it continued till about 18 Years ago it was removed, with the rest of the Records, *&c.* into the Place, where they now lie, as a more proper Repository for them, if I am righty informed. In a word, this *Original Will* has been often seen and perused by able Judges, by whom I have been assured, that the Letters of the *King's Name* are evidently formed by a Pen; and therefore strictly and properly *by his Hand*, and not by his *Stamp*: They have likewise observed, that some of the Stroaks of the Letters are plainly uneaven, as drawn by a weak and trembling Hand, in the Time of his Sickness; and are manifestly distinguishable from those made by his *Stamp*, which is presently discerned at the first View. I will not presume to undertake for the Exactness of this Account, though I have good Reason to rely upon it; but if the Reader has any Scruples, he may easily satisfy his Curiosity, by comparing the *King's Name*, as it is at the Head of this *Will*, with his Stamps; many whereof may be met with in the *Cotton*, and other Libraries about the Town. From whence it is evident, how little the Court of Queen *Elizabeth* troubled themselves

(*x*) *See his* Defence *of* Mary *Queen of* Scots, p. 94, 102, 106, 117. B. 2.

(*y*) *In his* Defence *of the House of* Suffolk, *printed in the* Appendix, N. 7.

(*z*) *A true Copy of it may be found in the* Appendix, N. 8.

(*a*) *I have before recited this Order*, p. 189.

about

about the Dispute concerning the *Right of Succession* in the House of *Suffolk*; since they suffer'd such Mistakes to pass upon the People, without the least Contradiction, when it was in their Power to rectify them at their Pleasure.

Again, we are told by the Adversaries to this *Will*, that the Witnesses to it were of no Quality or Fortune; and therefore not like to be made use of by a Prince upon such an Occasion: And they add, that it is no small Prejudice against it, that it was never proved in the *Spiritual Court*. But these are vain, and frivolous Objections; for of those that signed as Witnesses, the first was a Knight, three others were the King's Physicians, and the rest, Gentlemen that had good Employments about the Court; and therefore he gives each of them such Legacies in his *Will*, as in those Days were not thought inconsiderable. As for the *Probate* of the *Will*, whether or no it was performed according to the usual Forms in the *Spiritual Courts*, is a Point of no Moment, and therefore not worth enquiring after. It is enough, that it was laid before both *Houses of Parliament*; and that the Executors advised with the Judges, and other able Lawyers about it; who gave their Opinions, how it might be best executed, as a good and valid *Will*. Besides, this we are assured, that the Council required the *Lord Chancellor to cause it to be recorded, and enrolled in Form accustomed*; and therefore if any will still insist upon it, that it ought to have been proved in the *Spiritual Courts*; it will be expected, they should give an Instance of any *Royal Will*, that was ever subjected to those common Forms.

Lastly, It is objected, that the Earl of *Hertford*, and Lady *Katharine Grey*, (eldest Daughter to the Duke of *Suffolk*) being required to prove their Marriage in the Beginning of Queen *Elizabeth*'s Reign, (*b*) and a certain Time being limited, within which they were obliged to produce their Witnesses, they were not able to do it; and therefore the Archbishop of *Canterbury* proceeded to a definitive Sentence, whereby the pretended Marriage was declared Null and Void; and consequently the Title from this Lady (who was first in Descent from *Charles Brandon* and the *French* Queen) was entirely defeated. But this Objection does not affect the *Derby* Family, which derives itself from the Lady *Eleanor* the youngest Sister.

(*b*) Camden Annal. Eliz. A. D. 1562.

(c) Dugd. Baron.

Sister. Besides, Sir *William Dugdale* assures us, (c) *That the Validity of the Earl of* Hertford's *Marriage was afterwards brought to a Tryal at the Common Law; when the Minister, who married them, being present, and other Circumstances agreeing, the Jury (whereof* John Digby *of* Colshill *in the County of* Warwick *Esq; was the Fore-Man) found it a good Marriage.*

THUS I have at large consider'd all the material Objections against the Validity of *Henry* VIII.'s *Will*; and, if I am not too partial to my Performance, I shall never be put to the Trouble of a farther Vindication of it. But for the Reader's greater Satisfaction, I have inserted in the *Appendix* to this Discourse, a genuine Copy of this *Original Will*, and also *Mr.* J. Hale's *Defence of the House of* Suffolk; by the Perusal of which he may be more fully instructed in this Controversy. I shall only now add, that as much as this Exclusion of the *Scotch* Line has been exclaimed against; there was a politick Reason for it, which will justify *Henry* VIII. in the Opinion of many Persons; and that was, because the Regency of *Scotland* had refused to marry their young *Queen* to *Prince Edward*, according to the Agreement made for that Purpose. This Refusal was so much resented by *Henry* VIII, that it undoubtedly occasioned this Limitation of the Succession in his *Will*; not only for a Punishment for their Noncompliance; but rather as an Inducement to them to consent to this Marriage; since otherwise there was no Hopes of obtaining the Crown of *England*: And it may likewise be observed, that by their Obstinate Rejecting all Overtures for this Marriage, the *Scotch* drew upon themselves that bloody War, which was successfully managed against them in the Beginning of *Edward* VI.'s Reign, under the Conduct of the Duke of *Somerset*; for in his Declaration this is assigned as the chief, and, if I mistake not, the only Reason of it.

I MUST now hope the Reader will pardon me for detaining him so long upon this Subject, being a Piece of History very little, if at all known, and which must be allowed to be of great Consequence to the Point I am now upon. For the Validity of *Henry* VIII.'s *Will* being once established, it will inevitably follow, that King *James* I. ascended the Throne of *England* directly contrary to the Order of Succession appointed by several

Acts

Acts (*d*) *of Parliament*; and yet in the Act, which recognized him, it is expresly said, (*e*) *That immediately upon the Dissolution and Decease of* Elizabeth *late Queen of* England, *the Imperial Crown of* England, *&c. did by Inherent Birthright, and Lawful and Undoubted Succession, descend and come to the said King* James, *&c.* so that, tho' it is in Fact true, that several Limitations of the Succession have been made in Parliament, and Persons, who were entitled to the Crown by Primogeniture and Blood, have thereby been excluded; yet it is also evident, that no Precedents have hitherto been met with, of *Parliamentary Entails*, that have long prevailed against those, that claimed by *Common Law*. And it is not a little remarkable, that tho' Queen *Elizabeth* thought fit to make it *High Treason* (*f*) *for any one, during her Life, to affirm, that she and her Two Houses of Parliament could not make Laws of sufficient Force and Validity to bind the Descent and Inheritance of the Crown*; yet this very Queen, whose Wisdom is so justly esteemed Abroad, and admired at Home; whose Memory is so deservedly precious among all true *Englishmen*; and whose Example will be always looked upon as worthy of Imitation by her greatest Successors: This glorious Princess, I say, who knew very well, how the Succession was settled by her Father's *Will*, thought it no Blemish to her Honour, to discourage all the *Pretenders* of the House of *Suffolk*, throughout the whole Course of her Reign; and at last entirely defeated all their Hopes and Imaginations, by placing the *Stuart* Family upon the Throne. I speak not this out of a Design of commending her for any Violations of the Laws of her Country, which should always be esteemed Sacred by Princes themselves; and tho' perhaps she never had the Interest of her Kingdom more at Heart, than in this particular Action; yet I shall never pretend to defend her; if those, who are proper Judges in this Matter, shall think her chargeable with Injustice. I had before premised, that my Business was only to enquire into *Matter of Fact* in the present Point of Controversy, without any Regard to the

(*d*) Viz. *the* 35*th of* Hen. 8. *the first of* Edw. 6. c. 12. *and* 1 Eliz. c. 3.

(*e*) *It is observable, that this Bill for the Recognition of King* James I. *as* True and Rightful King of *England*, *was read* three Times *the same Day in the House of Commons. See the Journal of that House,* 1° Jacobi. *And this, I believe, was the first Time that such a Compliment was paid to any Bill.*

(*f*) 13 Eliz. c. 1.

Question of *Right*; and in Pursuance of this Purpose, I have now brought down my Enquiries to the Reign of King *James* I; and made it evident (if I may venture to speak with so much Assurance) that he succeeded contrary to several Acts of Parliament, by which he was expressly excluded. I have farther observed, that his Accession to the Throne was studiously promoted, and at last effected by Queen *Elizabeth* herself and her Council; and therefore I do not pretend to acquit her of a manifest Contempt of those *Acts of Parliament*, from which her Sister and she in some Measure derived their Right to the Crown.

It may be now expected, since I have in a manner arraigned the Memory of Queen *Elizabeth*, for acting contrary to a *Parliamentary Entail*; that I should make good my Accusation by good Authority; and that I shall now attempt to do. Soon after (*g*) her Possession of the Crown, she came to this Resolution with the *Scotch* Ambassador, that if his Queen would abstain from using the *English* Arms and Titles, during the Life of Queen *Elizabeth*, she wou'd oblige herself and her Children, to do nothing in Prejudice of the Queen of *Scots* Succession. And when (*h*) *Maitland*, the *Scotch* Ambassador, pressed her to declare his Mistress her next Successor; she made Answer, *That his Queen might assuredly expect at her Hands, that she would never wrong her, nor her Cause, if it were just in the least Point:* And then she added, *I take* God *to witness, who heareth this Conference, that next myself, I know not any one, whom I would preferr to her, or who (if the Title should fall to be controverted) might exclude her.* These were early Significations of her Good-Will towards the *Scotch* Family, in the Beginning of her Reign; and, on the other side, she was so far from giving any Countenance to the Pretensions of the House of *Suffolk*, that Mr. *Hale* was (*i*) imprisoned for presuming to write a Defence of their Title, and Sir *Nicolas Bacon*, Lord Keeper, who was supposed to have assisted him in it, was long out of Favour upon that Account. Soon after, Mr. *Thornton*, *Law-Reader* of *Lincolns-Inn*, (*k*) was order'd into Custody for arguing against the Right of the *Scotch* Queen. And within a short Space of Time, finding the Party for the House of *Suffolk* were very busy, and bold in asserting the Claim of that Family;

(*g*) *This was in the Year* 1561. Spotswood's *Hist. of the Church of* Scotland, p. 182.

(*h*) Spotswood, Ibid. p. 181.

(*i*) Camden's Eliz. A. D. 1564.

(*k*) Camden's Eliz. A. D. 1566.

mily; (*l*) she permitted the Bishop of *Rosse* to publish his Vindication of the Rights of his Queen; in which he is said (*m*) to have been assisted by Sir *Anthony Brown*, *Chief Justice* of the *Common-Pleas*, and one *Caryll* an eminent Lawyer. 'Tis true, she took Care to let King *James* know, that while he continued of the Popish Persuasion, he must not hope for her Friendship; and even his Mother, as violent a Papist as she was, knew so well the Aversion, which the Court of *England* had against her Religion, that she (*n*) never thought it advisable in any of her Letters to her Son, to dissuade him from persevering in the *Protestant* Profession; and when she was laying her Head upon the Block, she sent this last Message to him; *That although she was of another Religion, than that wherein he was brought up, yet she would not press him to change, except his Conscience forced him to it; not doubting, but if he lead a good Life, and were careful to do Justice, and govern well, he would be in a good Case in his own Religion.* In Compliance therefore with the wholsome Counsels of his best Friends, he at length (*o*) declared himself openly against the Church of *Rome*; and thereby gained entirely Queen *Elizabeth*'s Affections, who before had dispensed her Favours to him but sparingly, and with great Reserves. But as soon as she was assured, that his Sentiments in Religion became conformable to her own; she was not wanting in all proper Encouragements to him, to look upon the Succession as effectually secured to him after her Decease: And it is not a little remarkable, that her Chief Ministers, who had been most active in bringing the Mother to the Scaffold, were not afraid to continue their utmost Endeavours, to bring the Son to the Throne; so much more powerful was their Concern for the Interest and Welfare of their Country, than their Regards to their own private Safety and Advantage. King *James* therefore having now laid so good a Foundation, was no longer in Danger of a Disappointment; so that when Queen *Elizabeth* lay a dying, Mr. (*p*) *Camden* assures us, *He was the only Person*

(*l*) Camden's Eliz. A. D. 1569.

(*m*) Camden, Ibid.

(*n*) *King* James *gives this Account himself of his Mother's Carriage towards him, in his* Premonition to Christian Monarchs.

(*o*) Camden's Eliz. A. D. 1594.

(*p*) Annal. Eliz. A. D. 1603, *and Sir* Henry Savill, *in his Epistle Dedicatory to King* James, *before the Edition of S.* Chrysostome's *Works, tells the King*; Perpetuâ charitate te, ut Filium, complexa est

thought

thought of for her Successor; to whom the Heads of all Parties immediately (q) paid their Compliments, as the Prince whom the Queen always justly and heartily favoured. And both (r) he and Archbishop *Spotswood* relate it, as a certain Truth, that she declared him her Successor, before the Archbishop of *Canterbury*, and the Lord *Admiral*, with her last and dying Breath. And no sooner had she expired, but her Privy Council (s) dispatched a Letter to King *James*, to acquaint him with it; in which they declare his undoubted Right, and promise to serve him with the utmost Fidelity; and the same Morning Care was taken to proclaim him King. Thus was King *James* at length placed upon the Throne of *England*, in Opposition to the several *Acts of Settlement* made against him; and thus was *Henry* VIII. disappointed in his Endeavours to exclude the *Scotch* Family.

I SHALL conclude this Head with the following Reflexion of Sir *Walter Raleigh*. (t) As for *Henry* VIII, *what Laws and Wills did he devise to establish this Kingdom in his own Issues? using his sharpest Weapons to cut off and cut down those Branches, which sprang from the same Root, that himself did. And in the End (notwithstanding these his so many irreligious Provisions) it pleased* GOD *to take away all his own without Increase.*

THE Doctor's last Effort to prove the Authority of Parliamentary Entails, is from the Succession of Queen *Mary* and *Elizabeth*: *The first of which,* (u) he says, *claim'd the Crown chiefly by Virtue of the* 35 Henry VIII, *and She or Queen* Elizabeth *cou'd have no other Title to it. Both of them could not have a Title by Birth; and yet both successively ascended the Throne by this Act of Settlement. Both had been declared by Law illegitimate in the* 28 *of* Henry VIII, *and one of them was not of Legitimate Birth; and therefore could have no other Title to the Throne, but what this Act gave her.* And soon after, the Doctor again assures us, (x) *That*

Regina; neque mente solùm & cogitatione, sed etiam non obscuris sermonibus designabat Hæredem. Id quod eò fidentiùs affirmo, quòd non ex incertis aliorum rumoribus, sed ex ipsius hoc ore præsens acceperim, cùm forte de tuâ majestate privatim, ut fit, sermo incidisset.

(q) Spotswood *says*, (p. 470.) *Secretary* Cecill *had assured King* James *of his Service; and the Earl of* Northumberland *advertised him of the Queen's Sickness, and advised him to make haste to take Possession.*

(r) Camden *at the End of his Annals, and* Spotswood, *p.* 171.

(s) *Archbishop* Spotswood's *History of the Church of* Scotland, *p.* 472, 474. *This Letter is sign'd by the Privy Council, and many of the Nobility,* (March 24.) *in which they expresly acknowledge, that to his Right the Lineal and Lawful Succession of all their late Sovereign's Dominions did justly and only appertain.*

(t) *Sir* Walter Raleigh's *Preface to his History of the World.*

(u) *Defence of the View*, p. 5.

(x) Ibid. p. 8.

Queen

Queen Mary *or Queen* Elizabeth *was certainly illegitimate, and therefore could have no other, but a Parliamentary Title to the Crown; And yet it is certain, that Queen* Mary *was brought to the Throne chiefly by the Assistance of her Protestant Subjects, who yet generally did not believe her of Legitimate Birth; and Queen* Elizabeth *was proclaimed by the Authority of a Popish Parliament, who as generally believ'd her illegitimate. Which shews, that both* Protestants *and* Papists *agreed in maintaining the* Act of Succession, *that was made the* 35 *of King* Henry VIII; *and consequently both believed the Descent of the Crown of* England *was limitable by Act of Parliament.*

I HAVE here again the Misfortune to dissent from the Doctor in most of the Propositions contain'd in these Passages. And first of all, I cannot agree with him, that these Queens could have no other Title, than the 35 *Henry* VIII; for the Acts of Parliament teach us otherwise, when they tell us, *That the* (y) *Imperial Crown descended to Queen* Mary; and that (z) *Queen* Elizabeth *was Rightly, and Lineally, and Lawfully descended from the Blood Royal of* England: If these Ladies did not insist upon their *Birth* among their other Claims, they might have good Reasons for that Omission; but surely the Doctor will not from thence inferr, that they did not think themselves *Legitimate*. That they were both *Bastardiz'd* by Act of Parliament is certain; but if that proves any thing, it is more than the Doctor seems willing it should: For it will then follow, that neither of them had a Title by *Birth*; whereas he does not dispute, but one of them might be Legitimate; tho' he does not determine, which it was. But why might they not both be Legitimate? Let us a little enquire into the Reasons, upon which such an Assertion must be founded. The Marriage between King *Henry* VIII. and Queen *Katharine* was declared Null and Void by the proper Courts of Judicature, and the supreme Authority of the Kingdom; therefore it is said, their Issue must needs be *Illegitimate*: But the *Canonists* utterly deny this Consequence; for (a) they unanimously

(y) 1 Mariæ 1.
(z) 1 Eliz. 3.
(a) Filii procreati ex matrimonio nullo, quandoque legitimi censentur, nempe propter bonam fidem *Alterius* ex Conjugibus. Can. ex tenore. Qui filii sunt legit. c. pervenit eodem Tit. Covarruvias de Matrimonio. P. 2. Tom. 1. p. 221. *Here we see* bona fides *in one of the Parties only is sufficient.*

affirm, *that Marriage contracted* bona fide *(notwithstanding any Impediment, which may afterwards be discovered) is sufficient to render the Children Legitimate*; so that according to the Rules of that Law, (to the Decisions of which all Cases of this Nature have been constantly referred by the Practice of *England*) Queen *Mary* must be looked upon as *lawfully born*; for the (*b*) *Matrimony of her Parents was contracted, solemnized, and consummated by the mutual Agreement and Assent of them both; by the Counsel and Advice of the most wise and gravest Men of both their Realms; by the deliberate and mature Consideration and Consent of the best and most notable Men in Learning, in those Days, of* Christendom: And no Doubt or Scruple arose concerning the Lawfulness of this Marriage, till Twenty Years after, that is till many Years after the Birth of Queen *Mary*. And now, lest the Doctor should suspect me to be guilty of Partiality to a *Popish Queen*; or that I have advanced an Opinion never before approved of by any Learned *Protestants*; the following Authorities will, I doubt not, be sufficient for my Justification.

(*b*) 1 Mariæ 1.

(*c*) BISHOP *Godwin* lays it down as a *Rule of the Christians*, (*d*) *That Matrimony contracted without any conceived Impediment (altho' it after chance to be dissolved as unlawful) is of such Force, that the Children begotten in such Wedlock are to be accounted lawful*; and then he adds, *if this* Rule *be admitted as true, Queen* Mary *was legitimately born.*

(*c*) *Bishop* Godwin's *Life of Queen* Mary, p. 157. Fol.

(*d*) *To prove this Rule, he cites in the Margin several Places of the Civil and Canon Law.*

IN the late Reign of King *James* II. Dr. *William Clagett*, the very Learned and Judicious Preacher of *Grays-Inn*, publish'd an Answer to a *Popish Pamphlet*, entituled, T. W.'s *Queries concerning the* English *Reformation*. Among which the (*e*) following *Query* is observable. *If* Mary *was Legitimate Heiress of the Kingdom; then* Elizabeth *was not*, &c. This had been a *Popish Dilemma*, till of late Days; but now it seems the Doctor thinks it may do good *Protestant Service*; but I would intreat him to take Notice of Dr. *Clagett*'s Answer; *The Legitimacy of* Elizabeth (says he) *is plain, supposing the Marriage of Queen* Katharine *to King* Henry *to be void; but yet* Mary, *the Child of that Marriage, was not Illegitimate; because the Marriage was made without Fraud.*

(*e*) P. 31.

LASTLY, The present Bishop of *Salisbury*'s Opinion may possibly be thought of greatest Weight; I shall there-

therefore here set it down for the Reader's Perusal. It will be found in his *Reflexions* on the *Oxford Theses, relating to the* English *Reformation*, (another *Popish Pamphlet*) in answer to an Objection against Queen *Elizabeth*'s Legitimacy. (*f*) His Words are these:

(*f*) *Reflexion on the* Oxford Theses, *Part* 2. p. 32.

But in the last place it is to be consider'd, that here was an innocent Child in the Case, whose Legitimacy and Right could not be cut off by her Mother's extorted Confession: Infants are more particularly under the Protection of the Law; and therefore Acts passed against them in that State of Feebleness, have such Flaws in them, that they have always a Right to reverse them; so a single Witness, in such Circumstances as her Mother's were, could not be sufficient to disgrace and disinherit her; and the Confirmation of the Act of Parliament that followed afterwards, might have been a forcible Bar in Law to her; but could be no just one; for as a Bastard is still a Bastard, even tho' he were Legitimated by Act of Parliament, so a Lawful Child is still what 'tis, notwithstanding a Sentence of Bastardy confirmed in Parliament: And this is so true, and was so evidently the Practice of that Time, that even King Henry, *in his Suit of Divorce with Queen* Katharine, *was willing to have his Daughter* Mary *declared Legitimate; because Children begat in a Marriage, are begotten* bona fide; *and so they ought not to suffer, because of the secret Fault of their Parents. And if this was yielded in a Marriage, where both Parents were, according to the King's Pretensions, guilty of Incest; it was much more just in this Case of* Ann Bullen, *even supposing her Precontract true; for her secret Fault ought not to blemish nor ruin her innocent Child. Another Instance that fell out at this time in the Royal Family, is very considerable; and because it is little known, I fancy the Reader will not be displeased to have it particularly open'd to him.* Henry VIII.*'s Sister, that was Queen of* Scotland, *did after her Husband King* James IV.*'s Death, marry the Earl of* Angus; *and by that Marriage she had a Daughter, Lady* Margaret Douglas. *Some time after her Marriage she fell to be in ill Terms with her Husband, and discover'd a Precontract he had given to another; and upon this she sued him in the Spiritual Court; and it being proved, the Marriage was annulled; but her Daughter was still held to be Legitimated; and was entertain'd by King* Henry, *as his Niece, and given by him in Marriage to the Earl of* Lenox; *of whom descended the Lord* Darnly, *that was King* James I. *of* England*'s Father; and since he was consider'd to be the second*

second Person in the Succession to the Crown of England, *after the Queen of* Scots, *this shews, that by the Practice of that Time, a Precontract even legally proved, yet did not illegitimate the Issue, that were begotten* bona fide *by one of the Parents.*

THUS we see that *Protestants*, as well as *Papists*, have asserted the *Legitimacy* of Queen *Mary*, notwithstanding the Nullity of her *Mother's* Marriage, and the *Act of Parliament* which declared her a *Bastard:* And if the Doctor should now wonder, how they could presume to entertain an Opinion so contrary to Law; all that I can say for them is, that they believed it to be an unjust Law, and therefore of no Force and Obligation, as contradictory to the common Principles of Justice and Equity, by which the Christian World has been govern'd for several Ages. And the Doctor may be pleased to take Notice, this was Bishop *Jewell*'s Opinion too; for in the (*g*) Place before cited, he says expresly, that *the Crown of* England *was due to Queen* Elizabeth *by Inheritance, and by Succession.*

I MUST now follow the Doctor to his (*h*) *Chapter of Authorities*, in which he pretends to support his Opinion by that of our *best Modern Lawyers.* The Passages cited by him out of the three first, *viz. the Lord Chancellor* Bacon, (*i*) *the Lord Chief Justice* Coke, *and the Lord Keeper Bridgman*, have already received an Answer in the former Part of this Discourse, to which I beg Leave to referr my Reader; but for his farther Satisfaction I shall now shew him, that the two first of these *great Authors*

(*g*) *See his* View of a Seditious Bull, p. 13.

(*h*) *View*, cap. 6.

(*i*) *It may be proper here to observe, that this Citation from my Lord Chief Justice* Coke, (*in the third of his* Institutes, c. *Treason*) *is of suspected Authority, upon account of the many Errors in that Chapter and Volume; for a Proof of which the Reader may be pleas'd to peruse the following Passages:*

It was observed, (*by the Judges*) that in these Posthumous Works of Sir *Edward Coke*, of the Pleas of the Crown, and Jurisdiction of Courts, many great Errors were published; and in particular in his Discourse of Treason, and in the Treatise of Parliaments, *Kelyng's Reports*, p. 21. *And again*; There are many Things in Sir *Edward Coke*'s Posthumous Works, especially in his Pleas of the Crown concerning Treasons, and in his Jurisdiction of the Courts concerning Parliaments, which lie under a Suspicion, whether they received no Alteration; they coming out in the Time of that which is called the *Long Parliament*, in the Time of that desperate Rebellion against King *Charles* I. But certain it is, there are many Errors in those Places, Ibid. p. 49. *To these may be added the Opinion of the Author of the Discourse concerning the* Jurisdiction of Chancery, *at the End of the* Reports of Chancery, p. 2. 43. *where he plainly questions, whether my Lord Chief Justice* Coke *was the Author of several Parts of the third of the* Institutes.

are

are plainly against the Doctor in other Parts of their Writings.

It is a known Position of Doctor *Higden*'s, and evidently maintain'd throughout those his Books, with which I am now concerned, *that whosoever is King* de Facto, *is at the same time King* de Jure; whereby that usual Distinction is entirely laid aside, as destitute of any Foundation from the Laws of *England*. But my Lord Chancellor *Bacon* is clearly of another Mind; for he (*k*) says, *that* Richard III. *was King in Fact only, but Tyrant both in Title and Regiment; and so commonly term'd and reputed in all Times since.* And in (*l*) another Place he tells us, *That though* Henry VII. *should obtain by Parliament to be continued King, yet he knew there was a very great Difference between a King, that holdeth his Crown by a Civil Act of the States, and one that holdeth it originally by the Law of Nature and Descent of Blood:* What can be more evident, than that his Lordship believed, in these Passages, that *Richard* III. was not King *de Jure*, and that *Henry* VII.'s *Parliamentary Title* was not of equal Force and Authority with one by Blood? (*m*)

Again, Another Doctrine which undeniably flows from the Doctor's Principles, is this; *That whoever loses his Throne, must sit still contentedly, without using any Endeavours for the regaining of it; because the Person in Possession of it, is by the Laws of the Realm absolutely entitled to the Allegiance of the Subjects.* But his Lordship expresses the greatest Indignation imaginable against such an Opinion:

(*k*) *Life of* Henry 7. p. 1.

(*l*) Ibid. p. 4.

(*m*) *And what he says in another Place, is extremely remarkable to this Purpose:* (*In his* Advertisement touching a Holy War, *p.* 43.) The Prophet *Hoseas*, in the Person of God, saith of the *Jews*, They have reigned, but not by me; they have set a Seigniory over themselves, but I knew nothing of it. Which Place proveth plainly, that there are Governments, which God doth not avow: For though they be ordained by his secret Providence, yet they are not acknowledged by his Revealed Will: Neither can this be meant of Evil Governors or Tyrants; for they are often avowed and established as Lawful Potentates, *&c.* This Nullity of Policy and Right of Estate in some Nations, is yet more significantly expressed by *Moses* in his Canticle, in the Person of God to the *Jews*. I will incense you with a People, that are no People. Such as were no doubt the People of *Canaan*, after *Seisin* was given of the Land of Promise to the *Israelites*; for from that Time their Right to the Land was dissolved, though they remained in many Places unconquered. By this we may see, that as there are Kings *de Facto*, and not *de Jure*, in respect to the Nullity of their Title; so are there Nations that are Occupants *de Facto*, and not *de Jure*, of their Territories, in respect to the Nullity of their Polity or Government. *And in his Charge against* J. S. (Resuscit. p. 54.) *he calls King* Henry IV. *an Usurper.* Vide Locum.

Shall a Prince (says (n) he) *that is dispossessed, not make War for the Recovery? No Man is so poor of Judgment as will affirm it*, &c.

(n) *Considerations upon a War with* Spain, p. 3.

LASTLY, in his Case of the *Post-Nati*, he has this Passage; *That Allegiance continueth after Laws. I will only put the Case, which was remember'd by two great Judges in a great Assembly, which was; That if a King of* England *should be expulsed his Kingdom, and some particular Subjects should follow him in Flight or Exile in Foreign Parts, and any of them there should conspire his Death; that upon the Recovery of his Kingdom, such a Subject might, by the Law of* England, *be proceeded with, for Treason committed and perpetrated at what Time he had no Kingdom, and in Place where the Law did not bind.* Here we see *Treason* may be committed against a *King out of Possession*; and therefore his Lordship was not of Sir *Edward Coke*'s Opinion, who thinks the King *de Facto* only is the *Seignor le Roy*, to be understood in all Statutes of Treason.

BUT Sir *Edward Coke* himself was not always of this Opinion neither; for in the famous Case of the *Post-Nati*, being required in the House of Lords to declare his Judgment in that Matter, with the rest of the Judges; Two of the Points insisted upon were these; *That Allegiance is after Laws; and that Allegiance followeth the Natural Person, not the Politick. A prouver ceo fuit dit, que si le Roy soit expulse par force, & auter usurpe, encore le Allegiance n'est toll, comment que le loy soit toll.* These Words are very plain and clear, and manifestly shew, that *Allegiance* may be due to a *King out of Possession*; but it will be asked, how does it appear, that this was Sir *Edward Coke*'s Opinion? I answer, Sir *Francis Moore* (o) tells us, it was; and we have no Reason to doubt of his Testimony. He (p) says, *The Lord Chief Justice* Popham, *the Lord Chief Justice* Coke, *and Chief Baron* Fleming, *did give in this Answer with one Assent; and that the* (q) *rest of the Judges did affirm the same, excepting* Walmsly. So that now we have not only my Lord Chief Justice *Coke*'s Opinion for the Authority of a *King* de Jure *out of Possession*, but also that of the whole *Bench of Judges*; to whose unanimous Resolutions the Doctor at other Times is willing to pay so great a Deference. This Passage out of Sir *Francis Moore*'s Reports, had been before objected to the Doctor, to which he has thought fit to make such a Reply,

(o) *See his Reports in the Case of the* Post-Nati, p. 798.
(p) Ibid. p. 797.
(q) Ibid. p. 805.

ply, as shews he had as little Respect for his Reader, as for his Adversaries. *This Remarker*, says (r) he, *cites* Moore's *Reports, where it is said, that Allegiance follows the Natural Person of the King.* Here the Doctor stops short, and makes this shrewd Repartee, *as if* (says he) *a King* de Facto *had not a Natural Person.* But how can the Doctor's Adversaries help it, if Judges are sometimes impertinent; and Sir *Edward Coke* himself (the Doctor's Oracle) does not always speak Sense? For the Proposition here ridiculed by the Doctor, was Part of an Argument made use of by that great *Chief Justice*; and it is no otherwise applied by the Objector (with whom the Doctor was concern'd) than it was by the Judges themselves in *Moore*'s Reports. Let the Reader be pleased to examine the Place, and he will find, that the Intention of the Judges was to prove, that *Allegiance may be due to a King of* England, *in a Country, where the Laws of* England *are of no Authority*; and in order to this, they lay it down as a certain Proposition, *that Allegiance is after the Laws*; because it *follows the Natural Person of the King, not his Politick*; that is, though a King of *England* should be out of his Dominions, where he cannot put his Laws in Execution, and do the Office of a King; yet he still retains a Right to the Allegiance of his Subjects: Is it not then clear, in their Opinion, that *Allegiance* does not follow *Possession*? And is not this a Point of Law destructive of the Doctor's Positions; and therefore fit for his Adversaries to urge against him? But the Judges proceed farther: They add, *that if a King be expelled by Force, and another usurps, yet the Allegiance is not taken away, tho' the Law is*: One would think now, that the Sense of these Words were plain and obvious; that by *the King expelled*, would be meant a King *de Jure*, because no other's Throne can be *usurped*; and that whoever possesses the Rights of the King *de Jure*, though he be styled King *de Facto*, is an *Usurper* in the Intention of these Judges: By no means, says the Doctor: *By Usurper* in this Place, *you must not understand a King* de Facto; *this cannot be*; *because the Law is so far from ceasing under a King* de Facto, *that it is administred not only actually, but legally*, &c. *and therefore by* another that usurps, *must be understood a* Simon Mountfort, *a Lady* Jane Grey, *or an* Oliver, *under whom the Laws did cease*; *and no Judicial Proceedings were valid any farther, than* con-

(r) *Defence*, P. 109.

confirmed. But the Doctor has here grosly mistaken the Meaning of the Judges; for, *First*, those Words *Allegiance n'est toll, comment que le loy soit toll*, (which the Doctor translates, *Allegiance does not cease, though the Law does*) are to be understood only with regard to the Dispossessed King *de Jure*, with respect to whom the *Law* ceases, when he is out of his own Dominions, and has not Power to execute it; and this appears plainly from the fuller Report of this Argument of the Judges, which I before cited from my Lord (*s*) *Bacon*; for he tells us, they gave it for Law, that if any *particular Subject, who followed the King* de Jure *in his Flight or Exile into Foreign Parts, should conspire his Death; he might, whenever that King recovered his Kingdom, be proceeded against, by the Law of* England, *for Treason committed and perpetrated, at what Time he had no Kingdom, and in Place where the Law did not bind.* This sufficiently explains, what their Lordships meant by the *Law ceasing*: For, *Secondly*, The Law could not be said to cease under those very *Usurpers* the Doctor mentions. Whatever Power *Simon Mountfort* had, he never would presume to use it against the Authority of the Laws of *England*; for then he must have lost all his Interest among the *Barons*, on whose Assistance he entirely depended: And surely, if the Lady *Jane* perform'd any Acts of Government, they were agreeable to the Laws of *England*; if none, how could she be an *Usurper?* The Truth is, though the Doctor here, for a present Turn, is pleased to put her in the List of *Usurpers*; yet in (*t*) another Place, where he considers her Case more deliberately, he tells us, *She never was in the Throne, and that her Government was but* in Fieri, *she was not Queen* de Facto.

(*s*) P. 218.

(*t*) *View*, p. 68.

I COME now to *Oliver Cromwell*, under whom the Doctor affirms the Laws *did cease*; though it is a Matter of Fact, that cannot be contested, that his Courts of Justice had no other Rules for their Proceedings, but the Laws of *England*; and he may as well say, he did not govern at all, as that he govern'd by any other *Laws*, than those of *England*. And this was openly declared before the House of Lords, by the Attorney-General, and the rest of the Learned Counsel, in (*u*) *Baden*'s Case; for having argued from a Judgment given in *Oliver the Protector*'s Time, it was thereupon said, *That tho' it might be*

(*u*) *See the Cases in Parliament*, Rex versus Baden, p. 75.

be surmised, that this was an Opinion vented in evil Times; yet 'tis well known, that excepting their Criminal Proceedings, the Law flourished, and the Judges were Men of Learning; as Mr. Justice Twisden *hath often affirmed upon the Bench.* Well; but though the Law was actually administred by *Oliver Cromwell*, yet the Doctor says, it was not *legally; and therefore his Judicial Proceedings were not valid any farther, than confirmed.* Now here I am entirely of the Doctor's Mind, that *the Law was not legally administred by Cromwell*; but may we therefore say, the *Law ceased* under his Government? If we may, I know not how the Doctor's Three *Henrys* of the House of *Lancaster* can be acquitted of being *Usurpers*; for all their *Judicial Proceedings* were confirm'd by *Edward* IV, which the Doctor looks upon as an evident Proof of their Want of Validity. In a word, the Doctor's Kings *de Facto* are frequently styled *Usurpers* in the Laws of *England*, as well as *Cromwell*; and therefore since the Law has made no Difference between them, I shall never think it reasonable to believe, the *Judges* have done so in the present Case.

THE Doctor's next Author is my Lord Chief Justice *Hale*; but the Passages I have already cited out of his Writings, abundantly shew, that his Opinion was clearly against the Doctor; and the Reader will be very sensible of this Truth, by the following View of them, which I beg Leave to lay before him.

(x) 'A King *de Facto*, but not *de Jure*, such as were 'Henry IV, V, and VI, being in the sole and actual Possession of the Kingly Style and Government, is a King 'within this *Act*.

'And in such Case, the Right Heir of the Crown sitting still in a private Capacity, is not a King within 'this *Act*, till he obtain the Exercise of the Sovereign 'Power. This was the Case of *Edmund* Earl of *March*, 'and *Richard* Duke of *York*, who successively were the 'Right Heirs of the Crown, after the Death of King *Richard* II, as being descended from *Lionel* Duke of *Clarence*, the third Son of *Edward* III; whereas *Henry* IV. 'was descended from *John of Gaunt*, fourth Son of *Edward* III, and younger Brother of the Duke of *Clarence*, 'as appears at large by the Statute of 1 *Edward* IV, and 'the Book of 4 *Edward* IV, where the *Act* is printed.

(x) Historia Placitorum Coronæ MS. Vol. 1. cap. 13. *touching High Treason in compassing the Death of the King, Queen, or Prince, in the* Stat. 25 Edw. 3.

'In the Thirty Ninth of *Henry* VI, *Richard* Duke of 'York made out his Title to the Crown, by his Claim 'in Parliament, which Title, notwithstanding the Ob-'jections offer'd against it, was allowed, and acknow-'ledged; (*Vide Rot. Parl.* 39 *Hen.* 6. n. 15. *& sequen-'tibus*) but it ended in a Composition, that *Henry* VI. 'should hold the Crown during his Life, and that after 'his Death it should come to *Richard* Duke of *York*.

'Although the Duke of *York* was recognized Right 'Heir of the Crown; yet inasmuch as by Accord in 'Parliament, *Henry* VI. was to hold it during his Life; 'and the Duke, during that Time, was as it were sus-'pended from the actual Exercise of the Kingly Go-'vernment; the Duke was not a King within this *Act*, 'during that Time; nor was he the King's eldest Son, 'within the succeeding Clause; and therefore in the 'same Parliament Roll (*n.* 24.) there was a Special Clause 'in that Composition, that Compassing of the Death of '*Richard* Duke of *York*, now made Heir Apparent to the 'Crown, should be High Treason.

'This Accord was broken by the Means of the '*Queen*, and *Richard* Duke of *York* slain; whereupon his 'Son and Heir *Edward* IV, the True Heir to the Crown, 'assumed the Crown upon the fourth of *March*, which 'was the first Day of his Reign.

'If the Right Heir of the Crown be in the actual 'Exercise of the Sovereignty, suppose in one Part of the 'Kingdom, and an Usurper be in the actual Exercise of 'the Sovereignty in another; yet the Law judgeth him 'in Possession of the Crown, that hath the True Right; 'and the other is in Truth not so much as a King *de 'Facto*; but a Disturber only, and therefore not a King 'within this *Act*. This was the Case between *Edw.* IV, 'and *Henry* VI. Although *Edward* IV. took upon him 'the Sovereignty, and was declared King in *London*, 'upon 4 *Martii* 1460, yet *Henry* VI. was in the Northern 'Parts, and treated as a King, and raised a great Army; 'which being subdued by King *Edward* IV. in the latter 'End of *May*, in the bloody Battle of *Towton-Field*; 'then, and not till then, had *Edward* IV. the total and 'quiet Possession of the Crown; and in *November* fol-'lowing held a Parliament, wherein his Title is decla-'red, and the Commencement of his Reign enacted to

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be 4to *Martii* before; and *Henry* IV, *Henry* V, and *Henry* VI, declared Usurpers. During this Interval from 4to *Martii* to *June*, *Henry* VI. was used as King; and yet was not so much as a King *de Facto*; *Edward* IV. the Right Heir being likewise in Possession of the Regality.

'THE like was between Queen *Mary*, and the Lady *Jane Dudley*, who was proclaimed Queen at *London*, by Pretence of Nomination by King *Edward* VI, but held not the Title above Ten Days. For the same Time Queen *Mary* openly laid Claim to the Crown, and was also proclaimed Queen. So that both being *de Facto* in Possession of the Crown, the Law adjudg'd Possession in her, that had the Right, *viz.* Queen *Mary*; and therefore by an *Act* of Parliament (1 *Mar. c.* 3.) it is enacted, that Recognizances dated *An.* 1 *Reginæ Jane*, shall be allowed as good, which needed not have been, if she had been *Regina de Facto*, tho' an *Usurper*. Because *Judicial Acts* are not Diminutions of the Regal Revenue. 9 *Edw.* 4. 15, 11.

'AND if any shall say, that if *Henry* VI, or Queen *Jane* had gotten the Victory and Possession of the Crown, that possibly as much would have been asserted by them and their Participants against *Edward* IV, and Queen *Mary*: This is an Objection of no Value; for I do not take my Measures herein from Events, which are various and uncertain; but according to the true Right of Matters, pursuant to the Laws of *England*, as near as I can.

(y) 'THAT Lawful Prince that hath the Prior Obligation of Allegiance from his Subjects, cannot lose that Interest without his own Consent, by his Subject's resigning himself to the Succession of another.

(y) Hist. Plac. Coron. cap. 10. *Concerning Allegiance*, Vol. 1.

'AND hence it is, that the Natural-born Subject of one Prince, cannot, by swearing Allegiance to another Prince, put off or discharge himself from that Natural Allegiance. For this Natural Allegiance was Intrinsick, and Primitive, antecedent to the other; and cannot be devested without the concurrent Act of that Prince, to whom it was first due.

(z) 'ALTHOUGH *Edward* II. had a kind of pretended Deposing, and was pretended to have resign'd; and his Son *Edward* III. took upon him the Kingly

(z) Hist. Plac. Coron. cap. 13. Vol. 1.

'Name

'Name and Office; yet in the Opinion of those Times, 'Edward II. continued, as to some Purposes, his Regal 'Character: For in the Parliament (4 *Edw.* 3.) *Mortimer*, *Beresford*, *Gurny*, &c. had Judgment of *High Treason* given against them, for the Death of *Edward* II, after his Deposition. (*a*) Neither was that Judgment 'grounded simply upon the old Opinion in *Briton*, that 'Killing of the King's Father was Treason: For though 'in some Parts of that Record (as in the Judgment of 'the Lords against *Mortimer*) the Words are, *Touchant le mort Seignor Edward Pere nostre Seignor le Roy qui ore est*, &c. yet in other Parts of that Roll of Parliament, 'he is styled, at the Time of his Murder, *Seignor Liege*; 'and sometimes *Rex*, as *N.* 6. The Lords make their 'Protestation, that they are not to judge any, but their 'Peers; yet they declare, that they gave Judgment upon some, that were not their Peers, in respect to the 'Greatness of their Crimes; *Et ce per encheson de murdre de Seignor Liege*, &c. And in the Arraignment of *Thomas* 'Lord *Berkly*, for that Offence, the Record of his Arraignment is, *Qualiter se velit acquittare de morte ipsius Domini Regis*. And the *Verdict*, as it was given in Parliament, (4 *Edw.* 3. *N.* 16.) and the Record is, *Quòd prædictus Thomas in nullo est culpabilis de morte prædicti Domini Regis Patris Domini Regis nunc*, &c. So that the 'Record styles him *Rex* at the Time of his Death; and 'yet every one acquainted with History knows, that his 'Son was declared King, and took upon him the Kingly 'Office and Title, upon the 25th, or, according to *Walsingham*, 20 *Januarii*; and *Edward* II. was not murder'd 'till the 21st of *September* following. I have been the 'longer in this Instance, though it were before the Making of the *Statute* 25 *Edw.* 3. that it may appear, that 'this Judgment was not singly upon this Account, that 'he was Father to King *Edward* III; but they believed, 'that, notwithstanding the formal *Deposing* of him, and 'the pretended or extorted Resignation of the Crown, 'mention'd by the Histories of that Age; yet they still 'thought the Character *Regius* remained upon him; and

(*a*) *The Doctor may be pleas'd to take Notice, that the following Words are a full Answer to what he has transcribed from* Coke's Institutes, (*Defence*, p. 119.) *whereby the Error of that Chief Justice is corrected, and consequently the Doctor's Mistake in following him.*

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'the Murder therefore of him to be no less, than *High* '*Treason*; namely, the Killing of him, who was still a 'King, tho' deprived of the actual Administration of his 'Kingdom."

I SHALL now leave to the Reader and the Doctor to make their proper Reflexions upon these Passages, and try if they can reconcile them with his *View of the* English *Constitution*. I must expect indeed to be told, that the foregoing Extracts are taken out of a Book of my Lord Chief Justice *Hale*'s, to which the World is a Stranger; that where it is to be met with, is a Secret, and hardly possible to get Access to it; so that the Authority of these Citations depends entirely upon the single Credit of an unknown Transcriber; and consequently it cannot reasonably be expected, that much Weight should be laid upon them, in a Controversy of such Moment. To these Objections I can only answer, that I am well assured, these Citations were faithfully transcribed, many Years ago, from one of the *Folio* Volumes of the *History of the Pleas of the Crown*, written by my Lord Chief Justice *Hale*, which was then in the Custody of his Grandson, at his Seat in *Gloucestershire*: And this is all I can pretend to say for their Authority; with which if the Reader is not satisfied, I must be contented to stay for my Vindication till they are published, which, it is to be hoped, will be in a short Time. I doubt not however, but those that are acquainted with my Lord Chief Justice *Hale*'s Writings, will be of Opinion, that they sufficiently speak for themselves; or at least, that there are such Marks of Learning and Judgment in them, as evidently shew, they are by no means unworthy of him. But whatever may be the Fate of these Extracts, I would not have the Doctor imagine, that we are destitute of Proofs from other his Lordship's Writings, to manifest his Disapprobation of the Doctor's Notions. His (*b*) MS. *History, and Analysis of the Common Law*, is in many Hands; in which (*cap.* 5.) speaking of Right acquired by Conquest, he has these Words; *But still all this is intended of a Lawful Conquest, by a Foreign Prince or State; not of an Usurpation by a Subject, either upon his Prince, or Fellow Subject; for several Ages and Descents do not purge the Unlawfulness of such an Usurpation.* That is, such *Usurpers*, though they may be Kings *de Facto* for many

(*b*) *This Book has been since printed.*

Succeſſions, yet do not become Kings *de Jure*. An Opinion directly contrary to the Doctor's. Again; (c) *The Manner of Acqueſt of the Regal Title or Dignity, is either a Lawful Acqueſt, or an Unlawful one. A Lawful Acqueſt of the Regal Title, is either, firſt, by Municipal Laws and Conſtitutions of the Kingdom, which is no other but Hereditary Deſcent, according to the Laws and Cuſtoms of the Deſcent of the Crown of* England. *An Unlawful Acqueſt, which is by Uſurpation, is when a Subject ſhall invade the Right of the Crown, from him that is Rightful and Lawful Heir thereunto; and was done by King* Stephen *upon* Maud; *by* John *upon his Nephew* Arthur; *by* Henry IV. *upon* Richard II; *by* Henry V *and* VI, *upon the Line of* York; *by* Rich. III. *upon his Nephew. And herein is conſiderable, what Power the Law allows to ſuch Uſurpers, and what it denies.* Here it is plain, the Doctor's Kings *de Facto* are called *Uſurpers*; and though he ſays, the Law allows them ſome Things; that muſt be underſtood only of ſuch Things, as are neceſſary for the Order of Government, and not at all inconſiſtent with the Rights of the King *de Jure*.

The Doctor has now done with his *Modern Lawyers*: And in Requital, I ſhall ſet before him ſome Opinions and Practices of ſuch as are ancient; and that no proper Means may be omitted for his Conviction, I ſhall ſhew him, that the Laws themſelves teach us quite a different Doctrine, than what he has advanced in his late Accounts of our Conſtitution.

It is a known Poſition of the Doctor's, which is viſible in every Page of his Writings, (d) *That a King* de Facto *has all the Powers, Privileges, and Prerogatives of a King* de Jure. But the Practices of the great Councils in King *Stephen*'s, and *Henry* IV.'s Reigns, ſufficiently ſhew, they were of contrary Sentiments: For when the Biſhops and Clergy, in a general Aſſembly, were preſs'd by King *Stephen* to ſecure the Succeſſion to his eldeſt Son *Euſtachius*; they abſolutely refuſed it, as an Act of the higheſt Injuſtice to a Prince, that had a better Title. Is it not then evident, that the eldeſt Son of a King *de Facto* was not then thought to have a Right to ſucceed his Fa-

(c) Cap. xi. f. 3.

(d) *The Sovereign Authority of the* Engliſh *Government, as well Legiſlative as Executive, hath been ever acknowledged, both by our Laws and Lawyers, to be lodged in the King for the Time being; and that the Allegiance of the Subject has been due to him, and to him alone.* View, p. 52.

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ther in the Possession of the Crown? But nothing more clearly proves this Defect of Title in the Issue of Kings *de Facto*, than the Parliamentary Provisions made for the Succession of *Henry* IV.'s Children. In the fifth Year of his Reign, the Lords in Parliament swore to the Succession of his eldest Son, and his Heirs: This however did not satisfy him; and therefore two Years after, an Act passed for Settling the Crown on his Sons, and their *Issue Male*; and this was undoubtedly then looked upon, as a great Point gain'd; but still it was not to *Henry* IV.'s Mind; for by this *Act* the Female Descendants from him and his Sons, were excluded, with their Issue: About (*e*) half a Year after therefore he gets the Parliament in a good Humour; and prevails with them to settle the Succession of the Crown upon him, and his Sons, and their Heirs; whereby their Daughters, for Want of Male Issue, were made capable of the Succession. Now a King *de Jure* never wanted these Parliamentary Settlements; the *Common Law* of *England* having effectually provided for the Succession of his Issue; and if *Hen.* IV. had been a King *de Jure*, that is, one that possess'd the Crown by Lineal Descent, and Right of Blood; as he would have had no Occasion for such *Acts of Parliament*; so we may be confident, none of that Nature would ever have been denied.

(*e*) Rot. Parl. 7 & 8 Hen. 4. f. 4. *and* Rymer's Acta Publica. Tom. VIII. p. 462.

In the 21st of *Richard* II. a Petition was presented to the Parliament, for the Restitution of the *Spencers*; and an Act pass'd accordingly; for which one of the Reasons now upon Record, was this which follows: *viz.* (*f*) *Because* Edward II. *was living, and true King; and held in Prison by his Subjects, at the Time of that very Parliament of* 1 Edward III. *when the Judgment against the* Spencers *was declared good.* Now here we have an express Parliamentary Acknowledgment, that a King may retain his Authority after the Loss of his Crown; and that Laws made by the Usurper, who gets into his Throne, do not bind the Rightful Successor. The Doctor could not but be sensible, that this was an Objection of Importance; and therefore to give him his Due, he has taken some Pains to remove it. And,

(*f*) Rot. Parl. 21 Rich. 2. N. 64.

First, (*g*) He says, *This Act of Confirmation of the Judgment against the two* Spencers (1 Edward III.) *was not declared*

(*g*) *Dr.* Higden's *View*, p. 58.

clared void by the 21 Richard II. *but repealed; and therefore valid, until repealed.*

But this Answer will not do the Business; for from the Passage before recited out of the Records of 21 *Richard* II. I do not pretend to inferr the immediate Nullity of the 1st of *Edward* III. from the Time of the making of it; but only the Invalidity of it, with respect to *Richard* II.'s *Right* to declare it void, whenever he pleas'd. And therefore it is not material to say, he never used this Power; for the proper Question is, Whether he had not a Right to use it; which we see was plainly confess'd in open Parliament. The Doctor may remember, I choose rather to say, *Acts of Usurpers* are *voidable*, than *void*; and therefore, tho' none of the *Acts* made by *Edward* III. while his Father was alive, had ever been declared *void*; yet it would have been still true, that *Richard* II. had Authority, as King *de Jure*, to exercise that Power; which sufficiently shews the Difference between a King *de Facto* and a King *de Jure*.

Secondly, The Doctor urges, that the 21 *Richard* II. was repealed by the 1 *Henry* IV. To which Answer the Learned Bishop *Stillingfleet*, some while since, was contented to make the following Reply. (*h*) *The Parliament of* 21 Richard II. *was not*, says he, *legally repealed; for* Richard II. *was alive, and in Prison, when* Henry IV. *repealed the Parliament of* 21 Richard II. And besides this, 1 *Henry* IV. was declared void by the 1 *Edward* IV. For in that Parliament, (*i*) *it is ordained, and declared, and established, that all Statutes, Acts, and Ordinances heretofore made, in and for the Hurt, Destruction of the Right and Title of the late King* Richard, *and against his Royal Dignity and Governance*, &c. *shall be void, and be taken, holden, and reputed void, and for nought, adnulled, repealed, revoked, and of no Force, Value, or Effect.* Now certainly it cannot be denied, but the Repealing of the whole Parliament of the 21 *Richard* II, and that during the Time of his Imprisonment, was an *Act* against his *Right, Title, Royal Dignity*, and *Governance*; and consequently it is *adnulled* by the Words of the Record now recited.

(*h*) *The grand Question concerning the Bishop's Right*, p. 83.

(*i*) Rot. Parl. 1 Edw. 4.

I proceed now to put the Doctor in mind of some other Declarations in Parliament, no less clear and expressive against his Notions of our *Constitution*. It is an evident Consequence, which necessarily flows from the Doctor's

ctor's Positions, that the Dipossess'd King cannot justly make War upon the Usurper of his Dominions, for the Recovery of them; that he has no Right to the Allegiance of the Inhabitants of those Countries; and consequently, that for them to assist him in such Attempts, is downright Rebellion; and renders them obnoxious to the Pains and Penalties of it. But the direct Contrary is asserted in the Records of Parliament, which I humbly recommend to the Doctor's Consideration, in the ensuing Passages.

WHEN *Richard* Duke of *York* had been attainted by *Henry* VI. at *Coventry*; the Parliament Roll (*k*) says, *That the said Noble Prince* Richard *Duke of* York, *using the Benefice of the Law of Nature, and sufficiently accompanied for his Defence and Recovery of his Right to the Crown of this Realm, came thereunto, not then having any Lord therein above him, but* GOD; *and in the Time of a Parliament holden by the said* Henry, *late called King* Henry VI, *the 6th Day of* October, *the 29th Year of his said Usurped Reign; intended to use his Right, and to enter into the Exercise of the Royal Power*, &c. *as it was Lawful, and according to Law, Reason, and Justice for him so to do. And thereupon shew'd, open'd, declared, and proved his Right and Title indefeasible, whereunto it could not be answer'd*, &c. And in the same Roll, (*Sect.* 10.) it is affirm'd, *That the Commons having evident Knowledge, that King* Edward IV. *was in Right, from the Death of his Father, very just King of the Realm of* England; *and on the 4th Day of* March *in lawful Possession of the same; did desire it might be enacted, That the Taking of Possession, and Entree into the Exercise of the Royal Estate, Dignite, Reign, and Governance of the said Realme of* England, *and Lordship of* Ireland, *of our said Sovereign Liege Lord King* Edward IV. *the seid 4th Day of* March, *and the Amotion of the said* Henry, *late called King* Henry VI. *from the Exercise, Occupation, Usurpation, Intrusion, Reign, and Governance of the same, done by our seid Sovereign, and Liege Lord King* Edward IV, *the seid 4th Day of* March, *was, and is rightwise, lawful, and according to the Laws, and Customs of the said Realm; and so ought to be taken, holden, reputed, and accepted.* And a little after, (*Sect.* 32.) it is farther added; *Where certain Persons of evil, riotous, and seditious Disposition, joyed in Rumour, and rebellious Novelrys, adhering to* Henry IV, *late in Deed, and not of Right King of*

(*k*) Rot. Parl. 1 Edw. 4. *Sect.* 13.

England, *after his unrighteous, unlawful, and detestable Usurpation, and Intrusion, against his Faith, and Ligeance, upon King* Richard II. *his* (*l*) *righteous, true, and natural Liege Lord, tirannously murdered, with great Cruelte, and horrible Violence, in an outragious heady Fury, the Right Noble, and Worthy Lords* John Mountague *late Earl of* Salisbury, *and* Thomas *late Lord* Le Despenser, *and other true Subjects, and Liege Men of the said King* Richard, *after his Decease, continuing their Faith, and Ligeance, according to their Duty to* God, *and to the Laws, and Customs of the Realm of* England, *to* Edmund Mortimer, *then Earl of* March, *next Heir of Blood of the same King* Richard, *and in Right after his Decease to have succeeded as True, and Righteous King*, &c. *And whereas Judgment was given against them in a pretensed Parliament*, &c; *it is ordeined, that the seid Judgment be annulled and void.* And to the same purpose is this, which follows: (*m*) *The Petition of* Thomas Lumley *Knt. Cosin and Heir to* Rauf Lumley *Knt.* &c. *sheweth, That where the said* Rauf *and other were cruelly murdered and slain by* Henry IV, *late in Deed, and not of Right King of* England, *for the true Faith, Duty, and Ligeance, that they bore to the Right Noble Prince King* Richard II. *in his Days, and after his Decease, unto* Edmund Mortimer *Earl of* March, *next Heir to the seid King* Richard, &c. *and that in a Parliament holden the 2d Year of the seid Usurped Reign*, &c. *a Judgment of Treason was given against the seid* Rauf, &c. *Wherefore please it your Highness to stablysh and enact the seid Judgment to be void*, &c. Which was done accordingly; that Petition being read in open Parliament, and by the Assent of the Lords and Commons approved of by the King.

I AM persuaded, had the Doctor taken Notice of these Passages in our Records, (for he must allow me to believe, they escaped his Observation) he had entertain'd different Thoughts of our *Constitution* from those, which he has been pleas'd to publish; and yet a Person but moderately skilled in our Laws, will be able to make many Collections from them to the same purpose.

(*l*) *From whence it appears, how true it is, what the Doctor has affirmed*, That altho' *Edward* IV. called the Three *Henrys* no more than Kings in Deed, yet he doth not pretend, that his Ancestors were Kings of Right, whilst the Three *Henrys* were Kings in Deed. *View*, p. 52.

(*m*) Rot. Parl. 1 Edw. 4. Sect. 37.

It is a Maxim of the Law of *England*, (n) *That the King cannot be in a worse Condition than a Private Subject*; that is, it cannot be supposed, that the Law has taken less Care of his Rights, than of those of his Subjects: Now in the Case of Private Men nothing is more remarkable, than the great Concern of our Laws, to secure their Properties, and to procure them Justice and Satisfaction, when they are wronged; and therefore there is not a more established Rule in Judicial Proceedings, than this, that *the Law favoureth Right, even before Possession*; upon which a (o) Gentleman of eminent Knowledge in his Profession, has left us the following Comment. *When two are in an House or other Tenements, and one lays claim by one Title, the other by another Title; the* (p) *Law adjudgeth him in Possession, that hath a Right to the Tenements.* We are in Justice therefore bound to believe, according to the Rule before mention'd, that the King's Rights are at least as sacred in the Eye of the Law, as the Properties of Subjects; and consequently, that the Law cannot possibly countenance the Doctor's Positions, which manifestly favour *Wrong against Right.*

One would think, if the Doctor's Notions were at any time in Esteem, we should meet with some Proofs of it in *Henry* VI, and *Edward* IV.'s Reigns, when Subjects had most occasion to make use of them in those frequent Turns and Revolutions of Affairs; yet nothing to this purpose has he been hitherto able to produce, from the Histories of those Times; but I think I may say, we have good Evidence to shew, that they were slighted and condemn'd even by Kings *de Facto* themselves, and their Parties. When *Henry* VI. recover'd Possession of the Kingdom, he treated those that had adhered to *Edward* IV. as Traitors and Rebels; he reversed all the *Acts* of that Prince, as illegal, and of no Authority; and whenever he had occasion to mention him, it is in no better Terms, than those of *Traitor* and *Usurper*; (q) he styles him his *Great Rebel*, who *had lately possessed the Crown and Regal Dignity by Usurpation, and was only* de Facto *and*

(n) *Year-Books*, 4 Edw. 4. Term. Pasch. 4 *and* 9 Edw. 4. 2. Term. Pasch.

(o) *Sir* Hen. Finch *on Law*. B. 1. c. 3. p. 29, 45.

(p) *It is observable, that my Lord Chief Justice* Hale *applies this Rule to the Case of King* de Jure *and* de Facto. *See before*, p. 222.

(q) Rymer. Acta Publica. Tom. 11. p. 680, 696, 705, 706.

not

(r) Rot.Parl. 1 Hen. 7.

not de Jure *King*. And (r) in the 1ſt of *Henry* VII. it is declared in Parliament, that *Henry* VI. *had been attainted of High-Treaſon, contrary to due Allegiance.* Then it ſeems *Edward* IV, even whilſt he was upon the Throne, owed Allegiance to *Henry* VI. when he was out of it; a Doctrine utterly inconſiſtent with what the Doctor teaches us. Let us now ſee, whether it may be diſcover'd, from the Behaviour or Writings of any of the Friends and Adherents to *Henry* VI, that they were influenced by ſuch Principles, as the Doctor commends. And I ſhall particularly take Notice of Sir *John Forteſcue*, and Dr. *Morton*, afterwards *Archbiſhop of* Canterbury, *Lord Chancellor, and Cardinal*; Men eminent in their Generations, for their Wiſdom, and Knowledge of our *Conſtitution*.

SIR *John Forteſcue* was *Lord Chief Juſtice of* England, under *Henry* VI, when that Prince was driven from his Throne by *Edward* IV; but no ſooner did that Calamity befall his Maſter, and the fatal Battle of *Towton-Field* (in which Sir *John* was (s) preſent) had fixed the Crown on *Edward*'s Head, but he retired out of *England* with the Deprived Queen, and the Unfortunate Prince her Son. In this voluntary Exile from his Native Country he continued ſeveral Years, with ſo little Senſe of his Duty to *Edward*, though now King *de Facto*, that he not only ſcorn'd to make any Application to him for his Pardon and Favour, but by Seditious Writings againſt his Title, he made it his Buſineſs to animate thoſe, that were diſaffected to him. Afterwards indeed he was contented to make his Submiſſion; and his humble Petition is to be met with in the (t) Records of Parliament; but he could never be brought to this Compliance, till *Henry* VI. and his Son were both dead; and conſequently the Houſe of *Lancaſter* entirely extinguiſhed.

(s) *Sir* John Forteſcue *was attainted with many others, for aſſiſting* Henry 6. *in the Battle of* Towton-Field. *Vide* Rot. Parl. 1 Edw. 4. ſ. 20.

(t) Rot.Parl. 13 Edw. 4.

WHAT now can be pleaded in Defence of this great Man? A Perſon ſo eminently skill'd in the Laws of his Country, could not certainly be ignorant of the *Engliſh* Conſtitution. If, as the Doctor affirms, he was bound by it to pay his Allegiance to the King *de Facto*; ſurely King *Edward* was the only Perſon, that could lay Claim to it on that Account; for he alone was in Poſſeſſion. Shall we ſay then, that he was guilty of Rebellion,

lion, in Opposing his Lawful Prince, and not making an early Submission to him? I am afraid the Doctor will not readily approve of this Sentence; because I find him (*u*) citing him with great Reverence, as an Author of Consequence to his Cause; and yet I know not how we shall be able to acquit him, when we have thorowly consider'd all the particular Circumstances of his Behaviour; and our whole Charge against him is fully laid before the Reader. In the mean time, I will be bold to say, *Allegiance* he did indispensably owe to one King or other, either to *Edward* in Possession, or to *Henry* that was out of Possession; for no Natural-born *Englishman* can put himself out of the Condition of a Subject; or dissolve those Obligations of Duty and Obedience, which commence together with his Life: If it were so, Subjects might quit their Country, and transferr their *Allegiance* to what Prince they pleased, according to the Exigencies of Times, and their particular Humours and Inclinations; but the Laws of *England* will allow of no such Liberty; and therefore when Dr. (*x*) *Story* pleaded (upon an Indictment of High Treason in Queen *Elizabeth*'s Reign) *that the Judges had no Power over him; for that he was a sworn Subject to the King of* Spain; *he was condemn'd according to the ordinary Form of* Nihil dicit; *because no Man can shake off his Country, wherein he was born; nor abjure his Native Soil or Prince at Pleasure; and so he suffer'd as a Traitor.* It is not therefore to be doubted of, but Sir *John Fortescue* was sensible, he was still under the Obligations of an *English* Subject; and since it is certain, he followed the Fortune of *Henry* VI, and adhered to his Interest; it is to be presumed, he believed, that he was the only Rightful and Lawful King, though forced from his Throne; and not *Edward*, who was in full Possession of it.

(*u*) *Dr.* Higden's *View of the* English *Const.* p. 98.

(*x*) Camden's *Annals of Queen* Elizabeth, B. 2. An. 1571.

We have the same Account in our Histories given us of Dr. *Morton*; *He was a Man* (says (*y*) an eminent Author) *of great natural Wit, very well learned, and honourable in Behaviour. He had been fast upon the Part of King* Henry VI, *while that Part was in Wealth; and nathlesse left it not, nor forsook it in Woe; but fled the Realm with the Queen and the Prince, while King* Edward *had the King in Prison; and never return'd home, but to the Field; which*

(*y*) *Sir* Thomas Moore's *Life of* Richard 3.

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being irrecoverably loſt, King Edward *did not only* (z) *offer him his Pardon, but invited and woed him unto his Service*, &c.

WHAT Apology now can be made for theſe Gentlemen? Their Friends, it is true, think it an honourable Part in them, to preſerve their Fidelity to their Prince and Benefactor, amidſt his Misfortunes; but what then will become of our *Conſtitution?* That, ſays the Doctor, cancels all Obligations to Gratitude; requires them to deſert a ſinking and hopeleſs Cauſe, and demands their Allegiance for his greateſt Enemy, who, in their Opinion, fills his Throne by Violence and Injuſtice. Thus we ſee, two of the moſt conſiderable Friends to *Henry* VI, whoſe beſt Title has been hitherto ſuppoſed to be his *Poſſeſſion of the Crown*, perſever'd in their Loyalty to him for near ten Years, though he was a Priſoner moſt of that Time, without the leaſt Hopes of ever mending his Condition. Is this a Sign, that the Doctor's Principles were underſtood in thoſe Days, when of all others, he would perſuade us they moſt flouriſhed? But Sir *John Forteſcue* has yet more to anſwer for; he did not only withdraw from his Country, and refuſe to ſubmit to the Poſſeſſor of it; but (a) accepted of the Title of *Chancellor of* England, though granted him by a *Depoſed King*; and which is ſtill worſe, by his Writings he openly aſſerted the Right of *Henry* VI, and the Unlawfulneſs of obeying *Edward* IV. We have ſtill extant, in the (b) *Cotton Library*, his *Defence of the Houſe of* Lancaſter *againſt that of* York, in which he labours to prove, by ſundry Arguments, that the ſole Right to the Crown of *England*, as well by Lineal Deſcent, as by the Reſignations of the Houſe of *York*, was then entirely in King *Henry*: He pretended that (c) *Philippa* (from whom the Families of

(z) *Dr.* Morton *had been attainted in the Beginning of King* Edward's *Reign; but did not petition for his Pardon till the* 12*th.* Vide Rot. Parl. 1 Edw. 4. & 12 Edw. 4. f. 27.

(a) *Mr.* Selden's *Preface to Sir* John Forteſcue, de laudibus Legum Angliæ. *Dr.* Higden's *View of the Conſtitution*, p. 98.

(b) Bibl. Cotton. Otho. B. 1.

(c) *The Learned Biſhop* Stillingfleet, (*in his* Unreaſonableneſs of a New Separation on account of the Oaths, *p.* 21, 22, 26.) *having ſeen this Piece of Sir* John Forteſcue's *in Defence of the Houſe of* Lancaſter, *has been pleaſed to give it ſo much Credit, as to believe what he affirms concerning* Philippa's *Illegitimacy. But the ſame Author having confuted that Story, at large, afterwards, in his* Defence of the Houſe of *York*, (*which I am well aſſured his Lordſhip had alſo in his Hands*) *I wiſh he had thought fit to have acquainted the World with his Miſtake.*

Mortimer

Mortimer and *York* derived their Claim to the Crown) was not owned by the Duke of *Clarence* for his Daughter; that by the Law of *England* the Crown cannot descend to a (*d*) Woman; and lastly, he bestows no better Appellation upon King *Edward*, than that of *Usurper*; and expresly declares, he held the Crown no otherwise, than by Violence and Injustice. Can better Arguments be desired than these, that Sir *John Fortescue* did not approve of the Doctor's Notion? For would any Man take the Pains to prove, that a Prince out of the Throne is his only Lawful Sovereign, who yet is persuaded, that Allegiance is wholly due to a King *de Facto*? Besides, his Book *in Praise of the Laws of* England, was drawn up in the Time of his Exile, entirely for the Use and Service of the young Prince, eldest and only Son to *Henry* VI, that he might be timely instructed in the Laws of his Country, of which he looked upon him as the only Rightful Inheritor, after his Father's Decease. For this Reason we find him addressing himself frequently to that young Prince in the most respectful Language, as to the *Heir Apparent* of the Crown; *You*, says he, *most* (*e*) *renowned*, (*f*) *divine Prince*, (*g*) *who in time are to govern the Kingdom of* England.... (*h*) *I conjure you again and again, that you learn the Laws of your Father's Kingdom, to whom you are to succeed*; with several other Passages to this Purpose. Now it is impossible to conceive, that the Author of these Expressions could intend them for any other Purpose, than as Compliments to a Prince entitled to the Inheritance of the Crown by the Laws of *England*: For upon what other Account could he tell him, he should one Day *govern* England, *and succeed his*

(*d*) *For which, among others, he gives this extraordinary Reason*, viz. *because a Queen is not qualified by the Form of Anointing her, used at her Coronation, to cure the Disease called the* King's Evil. *His Argument being remarkable upon this Occasion, it may be some Entertainment to the Reader's Curiosity to have a View of it.* Item Regibus Angliæ Regali ipso officio plura incumbunt, quæ naturæ muliebri adversantur. ----- Reges Angliæ in ipsa Unctione suâ talem cœlitùs gratiam infusam recipiunt, quòd per tactum manuum suarum unctarum Infectos morbo quodam, qui vulgò Regius morbus appellatur, mundant & curant, qui alias dicuntur incurabiles. Item aurum & argentum Sacris unctis manibus Regum Angliæ in die Paschæ Divinorum Tempore (quemadmodum Reges Angliæ annuatim facere solent) tactum devotè & oblatum, Spasmaticos & Caducos curant; quemadmodum per annulos ex dicto auro seu argento factos, & digitis hujusmodi morbidorum impositos, multis in mundi partibus crebro usu expertum est. Quæ gratia Reginis non confertur, cum ipsæ in manibus non ungantur, &c.

(*e*) Fortescue de Laud. Leg. Aug. c. 5.

(*f*) Ibid. c. 21.

(*g*) Ibid. c. 4.

(*h*) Ibid. c. 5.

Father

Father in his Kingdom? Unless we are to suppose, Sir *John* spoke all this Prophetically, as an Event which should certainly come to pass, without any Regard to his present Right. I conclude therefore, that nothing can be more evident, than the Contrariety between this Gentleman's Notions of our *Constitution*, and the Doctor's. Sir *John Fortescue* thinks it his Duty to adhere to a Deposed King against the Possessor of his Throne: He asserts his Right in the Field with his Sword; in his Retirement, with his Pen; and interprets the Laws of his Country (in which his Learning has been always highly esteem'd) for a *King* de Jure *against a King* de Facto. To all this let me add, That when he made his Peace with King *Edward*, he retracted all that he had written against his Title; and asserted his Right with the same Zeal and Vehemency, that he had, before, King *Henry* VI.'s; for which he is highly commended by (*i*) my Lord Chief Justice *Coke*, as an Instance of his great Sincerity and Love for Truth. Now a properer Occasion than this could not be offer'd him, of acknowledging his former Error in paying Allegiance to a *King out of Possession*; and at the same time, he could not in Justice decline the Opportunity of vindicating the Authority of Kings *de Facto*, were there any Foundation in Law for such an Assertion, or had he been persuaded of the Reasonableness of it. But to our great Surprize, we find nothing in his Retractation to this Purpose; it is still extant, and may be perused, by those that are curious, in the (*k*) *Cotton* Library; but whoever gives himself the Trouble, will be sensible, that the whole Design of that Book is to prove the Right of *Edward* IV, from his Lineal Descent from the Duke of *Clarence*, and Nearness of Blood to *Richard* II, without any regard to his Possession.

(*i*) *Preface to the 10th Volume of his Reports.*

(*k*) Bibl. Cotton. Otho. B. 1. *This Retractation of Sir* John Fortescue *is mentioned in the Records.* Rot. Parl. 13 Edw. 4.

THERE is one Thing more, that must not be forgotten in this Place, though I had before Occasion to take Notice of it; and that is the remarkable Opinion of the Judges, together with Sir *Jeffry Palmer*, Sir *Heneage Finch*, Sir *Edward Turner*, and Mr. *Wadham Wyndham*, upon the Tryal of the *Regicides*. It was resolved by them, that the Indictment for the King's Murder should conclude, *Contra pacem nuper Domini Regis, Coron. & Dignitat. suas, necnon contra pacem Domini Regis nunc, Coron. & Dignitat. suas.* And they likewise agreed, that *though King*

Charles II. *was* de Facto *kept out of the Exercise of the Kingly Office by Traitors and Rebels, yet he was King both* de Facto *and* de Jure. This Account is given by Sir *John Kelyng* in his Reports [*p.* 11, 15.] publish'd *with the Allowance and Approbation of my Lord Chief Justice* Holt, *Mr. Justice* Powell, *Sir* Littleton Powys, *and Sir* Henry Gould. Here I think we have a different Notion of a King *de Facto*, from what the Doctor would teach us; and it is evident from it, that neither the Title of *King*, nor the Allegiance of Subjects, is upon any Account due to an *Usurper*.

THUS I have presented to the Reader's View some Passages taken from our Laws, and certain Testimonies also of ancient Lawyers, which clearly prove against Dr. *Higden*, that Kings *de Facto* were never consider'd in our *Constitution*, as Just and Legal Proprietors of the Kingdoms they possessed.

THE Doctor having now executed his Original Design, had nothing else to do, but to take his Repose, and reflect with Pleasure upon his Performance: But such is his Goodness, tho' he had entirely satisfy'd himself, and needed no Supply of Reasons to quiet his own Conscience, he was however willing to add some fresh Observations for the sake of his Readers. Upon so good an Account he will now undertake to prove, that the Holy Scriptures speak conformably to the Laws of our Country, and highly approve of his *English Constitution*. Now, tho' I cannot absolutely concurr with him in this Assertion; yet so far I am ready to agree, that his Doctrine is most certainly to be found in Scripture, and did eminent Service in two considerable Instances; for this was *Shimei*'s (*l*) Plea, when he cursed *David*; *The Lord hath deliver'd the Kingdom into the Hand of* Absalom *thy Son*; that is, *Absalom* is now in full Possession of thy Throne, and consequently GOD has rejected and depos'd thee. Here we have a clear Proof of the ancient Authority of the Doctor's Principle, which his Adversaries will never pretend to wrest from him. The other is that of (*m*) *Hushai*, who being reproach'd by *Absalom* for leaving *David* his Friend, justifies his Desertion by the same Reason; *Nay but whom the Lord, and this People, and all the Men of* Israel *choose, His will I be, and with Him will I abide.* By this honest Insinuation *Hushai* was immediately admit-

(*l*) 2 Sam. xvi. 8.

(*m*) Ibid. *ver.* 18.

ted into *Absalom*'s Council; that deluded Prince could not suspect the Fidelity of a Man, who came into his Interest upon so pious and religious a Motive; and the Doctor knows the Event.

But the Doctor will not allow, that *Hushai* err'd in his Principle; for he is confident, that God has always requir'd Obedience, as an indispensable Duty, to those who were in Power; and that the Scriptures furnish us with many Instances to that purpose. And,

(n) *View*, p. 101.

First, He tells (n) us, *That the* Jews *lived in Subjection to the* Midianites, *the* Moabites, *and other neighbouring Nations, when they were subdued by them.* Now what real Advantage the Doctor can derive from hence, is a Question: Can any one doubt, but Submission may be lawful even to unjust Conquerors, when once they have acquir'd a full Power and Dominion over a People, and when Resistance is utterly vain and impracticable? But Submission is one thing, and a Recognition of their Right another: And the latter may be often unlawful, when the first is manifestly lawful. Thus the *Cavaliers submitted* to *Oliver Cromwell*; they pay'd Taxes to him; and endured his Tyranny and Oppressions; because they saw no other Remedy: But surely they did not acknowledge the Lawfulness of his Government, nor own he had a Title to their Allegiance. For the same Reason, why might not the *Jews live in Subjection to the* Midianites *and* Moabites? Were they not subdued by them? Is not this confess'd by the Doctor? Was it then necessary they should die, rather than part with their Liberty? Or will he at last be so gracious, as to allow Captives to compound for their Lives, by entring into a State of Servitude?

Secondly, Admitting the *Midianites* and *Moabites* were unjust Aggressors, and reduc'd the *Jews* under their Obedience by a causless War, (which the Doctor will not be able to prove) it might however be lawful for the *Jews*, not only to live in Subjection, but also to pay an entire Obedience to them, as their Rightful Governors: For possibly they were at their own Disposal, and might give up their Rights and Liberties, as they saw occasion; and then it was reasonable, they should do so in those Extremities, when the Advantage would be very considerable to themselves, and no Injury thereby done to

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another. Or else it may be suppos'd, that their Prince or Ruler being in the same ill Circumstances with themselves, joins with them in this Surrender and Dedition; and then the Subjects are sufficiently justify'd by the Consent of their Sovereign. But had the Matter been otherwise; had the conquer'd King of the *Jews* refus'd to give up his Right, and GOD's Authority no way expresly interpos'd in the Case; would it then have been lawful for the *Jews* to have made a Compliment of their Allegiance to the *Midianites* and *Moabites* against the Will of their Prince? This is the Question, to which the Doctor's Adversaries desire Satisfaction; but this, it is to be fear'd, they will never obtain. For let the Doctor state the Fact, as he pleases; let it be granted, that the *Jews* did actually transferr their Obedience to those Nations, without the Leave of their Rightful Sovereign; how does it appear, that this was an honest and lawful Action? Does the Scripture expresly assure us, it was so? No, that is not pretended: How can we know it then? Why, the Doctor tells (*o*) us, that nothing appears in *Scripture* to the contrary: That is, whenever an Action is not condemn'd by the Holy Scriptures, we are at liberty to think it Legal and Imitable. Thus it is allowable to put a Trick upon a Father, and defraud a Brother, as *Jacob* did to *Isaac* and *Esau*; and thus we may tell a Lye upon a Motive of Compassion, as the *Egyptian Midwives* did to *Pharaoh*; because the Scriptures do not pass any Censures upon those Facts: And undoubtedly, for the same good Reasons the Doctor's Readers may honestly suffer themselves to be impos'd on by him; for surely it cannot be a Sin to be cheated, if it be none to cheat.

(*o*) *View*, p. 101.

WHAT has been said in Defence of the *Jews*, for their peaceable Behaviour under the *Moabites* and *Midianites*, will serve as well to justify their Obedience to the *Egyptians*, and other Conquerors, without the Assistance of the Doctor's Principle. But in the particular Case of their Subjection to the Kings of *Babylon*, we have something farther to urge in their behalf; and that is, the express Command of Almighty GOD, by Virtue of which they were oblig'd (*p*) to *bring their Necks under the Yoke of those Princes*, and serve them and their People: For unless we will dispute GOD's Supreme Dominion and Authority

(*p*) Jerem. xxvii. 12.

Authority over the World, we must allow his Nomination alone to be sufficient to convey a Right to Princes, and render their Acquisitions lawful. Now we must do the Doctor the Justice to own, he does not call in question God's Prerogative to dispose of Kingdoms in this manner; but he seems to deny, that the *Jews* could be influenced by that Consideration, under the *Babylonish* Captivity. For,

1. He says the *Jews* had submitted to the King of *Babylon* before God had commanded them to do so; which was not till *Zedekiah*'s Reign. But surely the Prophet *Jeremy* had given the *Jews* publick Notice, in the fourth Year of *Jehoiakim*, (*q*) that God would deliver them up to the King of *Babylon*, and had condemn'd them to a State of Servitude for Seventy Years. Now this Declaration alone, though it had never been seconded by any express Injunction of Obedience, was a sufficient Admonition to the *Jews*, that it would be best for them to live peaceably and quietly under their new Masters; for to resist, upon a full Assurance of doing it without Success, (which God had before-hand warn'd them, would be their Fate) must have been the Height of Folly and Madness. Again, the Commission, by Virtue of which the Prophet spake to *Zedekiah*, to bring his Neck under the Yoke of the King of *Babylon*, was given (*r*) in the Beginning of the Reign of *Jehoiakim*; and was then openly notify'd by the *Bonds and Yokes*, which *Jeremiah* was commanded to *put upon his Neck*. So that the *Jews* had early Notice, before *Zedekiah*'s Reign, that it was God's Pleasure, they should prepare their Necks for the *Babylonish* Yoke, and arm themselves with Patience for a long Captivity.

(*q*) Jerem. xxv. 9, 11.

(*r*) Jerem. xxvii. 1, *&c.*

But after all, though the *Jews* had indeed made an outward Profession of Obedience to *Nebuchadnezzar*; tho' two of their Kings, with all their principal Subjects, were his Prisoners in *Babylon*, and found it necessary to behave themselves there with all external Signs of Humility and Observance; though *Zedekiah* (*s*) govern'd *Judah* and *Jerusalem*, as an *Assyrian* Province, only by Virtue of a Commission from the Conqueror, to whom he had sworn Allegiance; yet the great Searcher of Hearts knew, that this their pretended Submission was altogether feign'd and hypocritical; and that they only wait-

(*s*) 2 Chron. xxxvi.

ed for an Opportunity to shake off the Yoke, which they were resolv'd never to bear, notwithstanding their publick Engagements to the contrary. This was the Reason of the many Messages, which God sent by *Jeremiah* to the *Jews*, requiring them to serve the King of *Babylon*, and threatning to abandon them entirely to the Mercy of their Enemies, if they departed from their Obedience to him. From whence it is evident, that how dutiful soever their Language and Addresses might be, nothing but Sedition and a Revolt was in their Hearts, which would unavoidably end in their utter Destruction. So that the utmost Use that can possibly be made of this Case of the *Jews*, is no more than this; That whenever a Conquer'd People are in the same Circumstances, in which the *Jews* then were; when *their Kings are bound in Chains, and their Nobles with Fetters of Iron*; and the remaining Heirs of the Kingdom have openly renounced all Pretences to it, by the most Sacred Obligations: In a word, when all Efforts for their Liberty seem evidently vain and ineffectual to common Sense; and the Voice of God has besides declar'd, that Resistance should be their Ruin; it is then not only lawful to be quiet and peaceable, but a manifest Indication of Distraction to be otherwise. And now, if the Doctor can draw an exact Parallel to this Case, from any Revolutions within his Memory, let him make the best of it.

From the Old Testament we must now wait upon the Doctor to the New, to which he assures us his Doctrine is also agreeable; *as appears*, says (*t*) he, *from our Saviour's Resolution of the Case, that was put to him, whether it was lawful to pay Tribute to* Cæsar, *or not. He bid them shew him the Tribute-Money; and only asked them, whose Image and Superscription it was*, (i. e. *who is in Possession of the Government?*) *and when they answer'd him*, Cæsar's; *he immediately determines, Render therefore to* Cæsar *the Things that are* Cæsar's, *&c.*

(*t*) *View*, p. 89.

Now here, I must confess, I am extremely at a Loss; and after my best Endeavours to discover by what profound Politicks the Doctor was induc'd to think this Argument for his Service, I am forced to give over my Enquiries, without any Prospect of Satisfaction. Has the Doctor then found it out at last; and is it no longer to be doubted, but that whoever has Power enough to

coin Money, is always in full and lawful Possession, and ought to be look'd upon as GOD's Vicegerent? Then surely it will follow, that *Oliver Cromwell* had a Title to the Allegiance of the People of *England*; for it can never be denied, but he might have shew'd his Money to the Cavaliers, and ask'd them the same Question, which our Saviour did the Pharisees, *whose Image and Superscription is this?* And the Doctor cannot but be sensible, that he must admit of this Consequence, unless he will decline the Authority of *Grotius*, to whom he has manifestly appeal'd for the right Understanding of this Place of Scripture. For *Grotius*, in the very Place (*u*) cited by the Doctor, plainly affirms, that his Allegiance was due only to the *States* of *Holland* and *West-Frizeland*, and not to *the States-General*; *To the former only*, says he, *I am sworn, and not to the latter, to whom the Military Men alone take Oaths of Obedience*: And then he adds, as a Proof, that he own'd Subjection only to the *States of Holland* and *West-Frizeland*, *That if any one in our Time had shew'd our Money, and ask'd, whose is this Image? Any Man, both the Learned and the Unlearned, would readily have answer'd; The States of* Holland's. Thus at length it appears, that our late *Commonwealth*, and even *Oliver Cromwell*, was no *Usurper*. But why then is the Doctor so angry with his Adversaries, when they tell him, his Arguments are as serviceable to that *Tyrant*, as to any of his Kings *de Facto?* Is there any one of their Objections, which he resents with greater Indignation, (*x*) than that which reproaches him with defending the Cause of *Cromwell?* Does not he tell them over and over, that *Cromwell had not the Supreme Power, or Sovereign Authority in* England, *and that it could never be prov'd, from his Principles, that the Obedience of the Subjects was due to him?* How! Is it possible that the Doctor should so much forget himself? Is it not his avow'd (*y*) Principle, that the *Coining of Money* is a certain Mark of Sovereignty? That whoever has that Power, ought to be obey'd by our Saviour's own express Precept and Direction? And is not this a good Proof of *Cromwell*'s divine Authority? But the Doctor tells us, our *Constitution* is a sacred Thing too; and by that he is very (*z*) confident, *Cromwell could not be authorized to exercise any manner of Power; for he had not the Regal Title, to which alone by our Laws the Royal Office is annex'd; and besides he had never been*

(*u*) Votum pro pace.

(*x*) *See his Defence*, p. 103, *to* 107.

(*y*) *View*, p. 89.

(*z*) *Defence*, p. 106.

been recognized by the States of the Realm. Thus it is, when we have to do with acute and judicious Writers; but then it is evident, that our *Constitution* teaches us one Doctrine, and the Holy Scriptures another: And how can it then be true, that they entirely agree in obliging Subjects to obey those, who are in Possession of the Government, which the Doctor expresly (*a*) affirms? In a word, if the Power of Coining Money be a sufficient Token of the Divine Commission of the Person possess'd of it, it will not only follow, that *Oliver Cromwell* was a Lawful Governor; but that we had some Hundreds such at once in *England* in King *Stephen*'s Time: For (*b*) a good Author tells us, *That in those Days many Castles were erected in every County by the great Men; and that there were then in* England *as many Kings, or rather Tyrants, as there were Lords of Castles, every one of them coining their own Money, and administring Justice to their respective Subjects.*

Upon this Occasion I would intreat the Reader's Pardon, if I detain him a little upon the Subject of *Cromwell*'s Authority, which though it has been sufficiently consider'd (*c*) already, yet it may be worth while to add some other Particulars, to convince the Doctor, that as he has managed the Matter, it will be hardly possible for him to prove *Cromwell* to have been an Usurper. His first Argument is this:

1. *Cromwell had not* (says (*d*) the Doctor) *the Supreme Power, or Sovereign Authority of* England. This is very strange! He exercised an absolute Sovereignty; He was courted by all Foreign Nations with *Fear and Trembling*; and the People of *England*, without Distinction, found it necessary to endure his Tyranny with Patience and Resignation. *The late Transactions of these twelve Years past* (says a (*e*) Lawyer of great Authority) *had involv'd so many Persons, that we could scarce find a Man, but he had need of the King's Mercy.* And another very (*f*) eminent Writer has assur'd us, *That the whole Estates of the Crown,*

(*a*) *View*, p. 89.

(*b*) Castella per singulas Provincias studio partium crebra surrexerant, erantque in Angliâ quodammodo tot Reges, vel potiùs Tyranni, quot Domini Castellorum; *habentes singuli percussuram proprii numismatis*, & potestatem subditis, regio more, dicendi Juris. Will. Neubrigens. Rer. Angl. l. 1. c. 22.

(*c*) *Introduction*, p. 3, & seq.

(*d*) *Defence*, p. 106.

(*e*) *The Solicitor-General, afterwards Lord Chancellor* Finch, *at the Tryal of* Cook *the* Regicide.

(*f*) *The late Bishop of* Rochester's *Observations on* Sorbiere's *Voyage.*

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the Clergy, and most of the Nobility and Gentry, and indeed well nigh the whole Nation, were then at the Usurper's Disposal. And (which I would only whisper in the Doctor's Ear, without designing it for the Information of the Reader) there was not one *Non-Juror* in all the Time of his Government.

(g) *Defence*, ubi supra.

2. We are told, (g) that *Cromwell could not be a Lawful Governor, because he had not the Regal Title, to which alone* (as the Doctor affirms) *by our Laws the Regal Office is annex'd.* But this is likewise a vain Surmise; for our Histories furnish us with Instances, that the *Regal Office* has been sometimes lawfully exercised, without the *Regal Title*; which I before (h) observ'd to be the Case of *Maud* the Empress; and on the other hand, we are certain, our Laws have conferred the Title of *King*, without annexing to it Sovereign Power. Thus the eldest Son of *Henry* II. was crowned and anointed King of *England* in his Father's Life-time; and yet he remained in the Condition of a Subject. (i) *King* Richard II, *when he had determin'd that* Robert *Earl of* Oxford (*who also was Marquis of* Dublin, *and Duke of* Ireland) *should be created King of* Ireland, *questionless did not doubt, but that he himself in the mean while possess'd that Island by as good a Title, although he was only styled Lord thereof.* And when *Henry* VI. had created *Henry Beauchamp*, Duke of *Warwick*, *King* of the Isles of *Wight*, *Guernsey*, and *Jersey*, (k) it was never disputed, but he still retain'd the supreme Dominion over those Islands.

(h) P. 51.

(i) *These are Mr.* Selden's *own Words in his* Mare Clausum, B. 2. c. 19.

(k) *Mr.* Selden, Ibid.

(l) *Defence*, Ibid.

3. The Doctor adds, (l) that *Cromwell had never been recogniz'd by the States of the Realm.* A Confession, that if this had happen'd, he would then have been a Lawful Monarch. And what is this, but attributing to the Three Estates a Power of Deposing Kings, as hath been abundantly (m) prov'd already? And after this plain Acknowledgment, the Doctor may inveigh against Republican Principles, as long as he pleases; but he has certainly so far subjected the Rights of Kings to the Will and Disposal of the *People*, that when once they have pronounc'd their Sentence, that *they will not have this Man reign over them*, there is then an End of all his Pretensions, and in an Instant he becomes a Private Person.

(m) *Introduction*, ibid.

Let not the Doctor be offended, that I apply the Name of *People* to the *States of the Realm*; for in their highest

highest Capacities they are but the *People*'s Representatives; and when all is said, the greatest Peers are but the greatest Subjects: And if they are no more than so, I wish the Doctor would shew us, where he finds it in our *Constitution*, that the Subjects can transferr their *Allegiance* whensoever they think it proper. To bring this Matter to a Point, I should be glad to learn from the Doctor, whether the Parliament which declared *Richard* II.'s Throne vacant, and placed *Henry* IV. in it, were Subjects, or not. The Doctor cannot but be sensible, that the Power he ascribes to the *States of the Realm*, will depend upon the Resolution of this Question; and therefore it is to be hoped, he will take it into Consideration.

Now though, the Doctor will find this Opinion of his very artfully supported in the learned Writings of *Buchanan*, *Milton*, and *Johnson*; yet I must not conceal from him, (if it be not a Presumption in me, to think this is a Secret to him) that the House of Commons of 1642, may justly claim the Honour of first setting this Doctrine in its true Light, and (which is a Circumstance much to be regarded by the Doctor, and will without doubt exceedingly endear that Statute to him) they endeavour to prove it from the eleventh of *Henry* VII. I shall set down the whole Matter, as I find it in *Rushworth*'s (*n*) Collections, and leave it to the Doctor, to form his Speculations upon it.

(*n*) *Part* 3. *Vol.* 1.

King *Charles* I. (*o*) recommends to his loving Subjects (in order to inform themselves, what their Duty was to him in those difficult Times) the careful Perusal of the Statute of the eleventh of *Henry* VII, which required their Attendance on the King in his Wars, as an indispensable Part of their Allegiance; and at the same time so order'd it, that the said Statute was reprinted by itself, and dispersed about the Kingdom. The House of Commons finding themselves concerned to prevent the dangerous Operation of that *Act of Parliament*, soon after resolv'd upon a Remonstrance for their Justification, and (*p*) they likewise particularly advise their Friends, to take great Notice of that Statute, as a proper Rule for their Conduct and Behaviour, in the following Words:

(*o*) *Answer to the Declaration of the Parliament*, May 4. 1642.

(*p*) May 26. 1642.

THAT *all Men may the better know their Duty in Matters of that Nature, and upon how sure a Ground they go, that follow the Judgment of Parliament for their Guide; we wish them judiciously to consider the true Meaning and Ground of that Statute, made in the eleventh Year of* Henry VII, cap. 1. *which is printed at large at the End of his Majesty's Message of the fourth of* May. *This Statute provides, that none that shall attend on the King, and do him true Service, shall be attainted or forfeit any thing. What was the Scope of this Statute? To provide that Men should not suffer as Traitors for serving the King in his Wars, according to the Duty of their Allegiance? If this had been all, it had been a very needless and ridiculous Statute. Was it then intended (as they may seem to take the Meaning of it to be, that caused it to be printed after his Majesty's Message) that they should be free from all Crime and Penalty, that should follow the King, and serve him in War, in any Case whatsoever, whether it were for, or against the Kingdome, and the Laws thereof? That cannot be; for that cannot stand with the Duty of their Allegiance, which in the Beginning of this Statute is express'd to be, to serve the King for the Time being in his Wars, for the Defence of him and the Land; and therefore if it be against the Land, (as it cannot be understood to be otherwise, if it be against the Parliament, the Representative Body of the Kingdom) it is a Declining from the Duty of Allegiance, (which this Statute supposeth may be done) tho' Men should follow the King's Person in the War: Otherwise there had been no need of such a Proviso in the End of this Statute, that none should take Benefit thereby, that should decline from their Allegiance. That therefore which is the principal Verb in this Statute, is the serving the King for the Time being, which cannot be meant of a* Perkin Warbeck, *or any that should call himself King, but such a one as, whatever his Title might prove, either in himself or his Ancestors, should be received and acknowledged for such by the Kingdom, the Consent whereof cannot be discerned but by Parliament, the Act whereof is the Act of the whole Kingdom, by the Personal Suffrage of the Peers, and the Delegate Consent of all the Commons of* England.

And Henry VII, *a wise King, considering that what was the Case of* Richard III. *his Predecessor, might, by Chance of Battle, be his own; that he might at once by such a Statute as this, satisfy such as had serv'd his Predecessor in his Wars, and also secure those, that should serve him, who might otherwise fear*

to

to serve him in the War, lest by Chance of Battle that might happen to him also, (if a Duke of York *had set up a Title against him) which had happen'd to his Predecessor; he procured this Statute to be made, that no Man should be accounted a Traitor for serving the King in his Wars for the Time being; that is, which was for the present allowed and received by the Parliament in behalf of the Kingdom. And, as it is truly suggested in the Preamble of the Statute, it is not agreeable to Reason, or Conscience, that it should be otherwise; seeing Men should be put upon an Impossibility of knowing their Duty, if the Judgment of the Highest Court should not be a Rule and Guide to them. And if the Judgment thereof should be followed, where the Question is, Who is King? much more, What is the best Service of the King and Kingdom? And therefore those that shall guide themselves by the Judgment of Parliament, ought, whatever happens, to be secure and free from all Account and Penalties, upon the Grounds and Equity of this very Statute.*

And to the same purpose they argue against the King, and defend this their Exposition of the 11th of *Henry* VII. in a following Remonstrance, *Nov.* 2. 1642. in these Words.

(q) God *be thanked, the Case is not now, as it was at the Time when this Statute,* viz. 11*th of* Henry VII. *was made, to secure his Subjects from that continual Uncertainty and Danger they were exposed unto, in respect of the different Titles of* York *and* Lancaster; *the one prevailing one while, and the other another time: And therefore by this Statute it was provided, that whosoever should serve the King for the Time being (whatever his Title may prove) should be free from all Crime and Penalty. So that whomsoever the Parliament had at that Time received in the behalf of the Kingdom, he must undoubtedly have been accounted the King for the Time being; and consequently the People secured in following him, tho' another and haply a better Title had been set up against him, (as if there had been a True Duke of* York *living, a better might have been set up against him,* Henry VII. *than his own:) We say then, as we said before, if it be against Reason and Conscience, that Men should suffer, that guide themselves by the Judgment of the highest Court, which is also the Representative Body of the whole Kingdom; and if in this Statute the Parliament is made Judge in the Question, Who is King? much more are they to be Judge in the Question, What is the best Service of the King and Kingdom?*

(q) Rushworth's *Collect.* Ibid.

dom? And they ought to be free from all Crime and Punishment, that follow the Judgment thereof, upon the very Grounds and Reasons of this Statute, which we do agree, his Majesty's good Subjects may read with Comfort; because it lays down a Ground, which delivers them from Uncertainty in their Obedience, in the difficultest and highest Cases whatsoever.

FROM these Extracts the following Remarks will be obvious to the Reader. 1. That the present Construction of the 11th of *Henry* VII, so often appealed to, and so much insisted upon by many eminent Writers soon after the Revolution, and now again lately by Dr. *Higden*, was of old urged, maintained, and published as Law, by that Parliament, which took up Arms against the King. I will not say, they were the first, that ever expounded this Statute in favour of Kings *de Facto*; for I think my Lord *Bacon* had before deliver'd his Opinion to that purpose: But I may boldly affirm, that none had ever, till that time, taken so much Pains to clear and establish the true Sense of it, by such solid and weighty Arguments, as those brave Assertors of the Rights and Liberties of the People of *England*. 2. They assure us, it was Part of our *Constitution*, that *whoever should be set up or owned by the Parliament as King, tho' another, and haply a better Title, should be advanced against him; (which might have been the Case of* Henry VII. *had the true Duke of* York *been then living;) he ought undoubtedly to be accounted the King for the Time being within that Statute.* And the Reason they assign for these Doctrines, is worth observing. *It is not agreeable* (say they) *to Reason or Conscience, that it should be otherwise; seeing Men should be put upon an Impossibility of knowing their Duty, if the Judgment of the Highest Court should not be a Rule and Guide to them*, &c. Thus then it is evident, that all those momentous *Points of Law*, which the Doctor has labour'd so much to defend in his *View*, were long since advanced, and asserted to his Hand, by that Learned Assembly of *True Patriots*, who began the Civil War againg King *Charles* I. The true Meaning of *Henry* VII.'s Statute could not escape the Penetration of that Judicious *Body*; they took care then to publish their Sense of it; and I have now, with great Fidelity, transcribed it for the common Benefit. Here we see the Doctor's Principle publickly own'd and embrac'd by the *Representatives* of the Nation; Allegiance is declared to be due to Kings *de Facto*, by Virtue of the

11th

11th of *Henry* VII, and not to all Kings *de Facto* neither, but only to such as shall be *receiv'd and acknowledged by Parliament*, or, as the Doctor chooses to express himself, *shall be recognized by the States of the Realm.*

It must be confess'd however, as well supported as this Doctrine is by the abovemention'd Authority, it is liable to some Objections, which it may become the Doctor to remove; and therefore I shall beg Leave to propose them to him.

1. It may be said, that when King *Charles* I. drew up his Answer to that Remonstrance of the *House of Commons*, in which they first vented their Exposition of the 11th of *Henry* VII; He takes Notice of it, as New and Singular, and never before heard of. *They proceed* (says the King) *in the Spirit of Declaring, to certify our Subjects in the Mistakings, which near* 150 *Years have been receiv'd, concerning the Statute of the* 11*th of* Hen. VII. cap. 1. (*a Statute our good Subjects will read with Comfort*) *and tell them, that the Service of the King for the Time being, cannot be meant of* Perkin Warbeck, *or of any that shall call himself King, but of such a one as is allowed and received by the Parliament in behalf of the Kingdom*, &c.

Here it is plain the *Good King* (who did nothing of this Nature without the Advice and Consent of his Council) wonders at the Construction given by the *Commons*, of this *Statute*; he recites it only with an Intention to expose it; and thinks it a sufficient Argument against it, that a different Opinion had universally prevail'd, ever since the first making of that Statute. Now I am apt to think, the Doctor will be a little surprized (I speak this still upon a Supposition, that these Passages had escaped his Observation) to find a Judicious Prince (for whose Memory, I am very sure, he has a high and just Value) so ignorant of our *Constitution*, as to treat with Contempt that very Opinion, which the Doctor has taken so much Pains to prove, will do the greatest Honour to our Country, and is the noblest Indication of its Wisdom. But this perhaps is an idle Imagination; and what some weak People may fancy to be Difficulties, will not appear so to the Doctor. I proceed however to another Objection.

2. We have likewise the Testimony of a very eminent Lawyer against the Doctrine of the *House of Commons*;

mons; and this he deliver'd in a Court of Justice at the Tryal of one of the *Regicides*. It is well known to those who have perused the Judicial Proceedings against those Criminals, that several of them pleaded the 11th of *Henry* VII. in their Defence; and particularly Colonel *Martin* had so good an Opinion of the Authority of that Statute, as expounded by the forementioned Parliament, that he plainly intimated, *a Parliamentary Title was the best King* Charles II. *had*. This Piece of Confidence was so highly resented by the (r) *Solicitor General* that then was, that he made the following Answer. *My Lord, this Gentleman, the Prisoner at the Bar, hath entred into a Discourse, that I am afraid he must have an Answer for in Parliament. He hath owned the King; but thinks his best Title is the Acknowledgment of the People, and he that hath that, let him be who he will, hath the best Title.* Now this is *Point-blank* against the Doctor's Assertion; for nothing is more evident, than that this *Great Man* was extremely offended with the Position, that a *Parliamentary* Title was the best a King of *England* could have. But certainly this is what the Doctor maintains; for he affirms, that the *Recognition of the States of the Realm* is sufficient to make a Lawful King, and then it must be sufficient to supersede a Title by Birth, and consequently is the *best Title*.

(r) *Afterwards Lord Chancellor* Finch.

I AM sensible, this has been a very long Digression, for which I shall need my Reader's Pardon; and this I doubt not he will grant the more readily, if he considers it consists of some Particulars too material to be wholly omitted, and will allow me to tell him, I am not now at Leisure to insert them in their proper Place.

I RETURN now to the Doctor's Argument from our *Saviour*'s Answer to the *Pharisees*, upon Sight of the *Tribute Money*. I have shew'd him the ill Consequence of *Grotius*'s Exposition of that Place; and would now recommend some farther Difficulties to his Consideration, which may be objected against that *Learned Man*'s Opinion. The Truth is, when a Text is capable of various Interpretations, and able Commentators are divided in their Sentiments about its true Meaning, it is a little too arrogant in the most applauded Writer, to think to impose his own Conjecture uncontroulably upon his Reader, before he has satisfied him, that the Attempts of others have really fail'd of Success. Thus it is with *Grotius*; he abounds

abounds in his own Sense, in the Explication of the Passage now before us, without pretending to confute the different Solutions, which have appear'd plausible to other Judgments; and I may appeal to Dr. *Higden* himself, the greatest of his Admirers, in the Question now under Consideration, whether that Learned Annotator has produced one Argument, by Virtue of which it is more reasonable to be of his Persuasion, than of theirs from whom he dissents. Let us examine this Matter more at large.

1. Some have been of Opinion, that our *Saviour* did not in these Words teach, that *Tribute* was to be *render'd to Cæsar*; 'Tis only, *say they*, a general Precept of giving to *God and Cæsar* their Due, without determining particularly, what their Right was. It may, it is true, be objected, that then our *Saviour*'s Answer was evasive, and not at all to the Question; but this gives them no Disturbance; for considering the insidious Intention with which the *Pharisees* put this Question, they are of Opinion, it was highly consistent with his Prudence to return such an Answer, as would rather silence them, than satisfy their Doubt; and this is said to have been Mr. *Calvin*'s Notion. In Defence of which they add, (*s*) that if our *Saviour* had expresly enjoin'd the Payment of *Tribute* to *Cæsar*, in this Answer, which was utter'd publickly, and before a great Multitude in the Temple; his Adversaries could not have had the Impudence, a few Days after, to accuse him before *Pilate*, as one that perverted the Nation, and forbad to give *Tribute to Cæsar*: For tho' there was no sort of Villany, that their Malice would not have prompted them to commit, in order to destroy him; yet they must have had too much Regard to their own Interest and Safety, to charge him with what so many knew to be a Slander.

(*s*) *See the Exercitation concerning Usurped Powers, printed* 1650.

2. Others think our *Saviour* did give a direct Answer to the *Pharisees*; but then they say, it will by no means follow, that he enjoined Obedience to all *unlawful* and *usurped* Powers; for his Command extended no farther, than to the Payment of *Tribute*; which may be due to ambitious, warlike, and dangerous Neighbours, rather as a wise Expedient to prevent a total Subjection, than as a necessary Consequence and Effect of it. In this Case it is not material, whether the Prince, that demands *Tribute*, has a Right to it, or no; because they that

pay

pay it, are ſuppoſed to conſider only his Power of Injuring and Oppreſſing them, which they are not able to oppoſe; and therefore may lawfully compound for their Security, by offering a Part, in order to ſave the Remainder. Now the *Jews*, at the Time we are ſpeaking of, were really a Conquer'd People; their Country had been reduced into the Form of a *Roman Province* by *Auguſtus*, and was entirely at his Mercy; but his Indulgence to them was remarkable; he permitted them to govern themſelves by their own Laws; and allow'd them Privileges ſeldom granted to a Vanquiſh'd Nation; in Return for which mighty Favours, he was contented with an Annual Tribute, which they had all imaginable Reaſon to ſubmit to. They knew very well, they had formerly paid Tribute to the *Egyptians*, the *Perſians*, and the *Macedonians*; and therefore had no Pretence to be ſcrupulous, now it was exacted from them by the *Romans*.

3. Another Reaſon aſſign'd, why our *Saviour* required the Payment of *Tribute* to *Cæſar*, was, becauſe he had a good Title to the Obedience of the *Jews*, by Virtue of their entire Submiſſion, and Surrender of their Government to the *Romans*. This was the Opinion of Mr. (*t*) *Selden*, and Dr. *Hammond*, not to name any more. They were perſuaded, that the *Jews* had unanimouſly put themſelves under the *Roman* Protection, and conſequently had bound themſelves to the Payment of *Tribute*, and all other cuſtomary Acknowledgments, due from ſubordinate States and Principalities to their Sovereigns: That for this Reaſon our *Saviour* called for the *Tribute-Money*, that by the Sight of the *Image and Superſcription*, they might be convinced, how unreaſonable their Pretenſions to Liberty were, after ſo plain and manifeſt a Reſignation of it, as then appeared to their View. For, in the Opinion of thoſe learned Men, this *Tribute-Money* exhibited undeniable Marks and Tokens of the *Roman* Authority over them, and therefore plainly determin'd the Queſtion againſt them.

(*t*) De Jure Nat. ſec. Hebræos, l. 6. c. 17.

Thus we ſee here are Three Expoſitions of our *Saviour's* Anſwer, much different from that of *Grotius*; for he ſuppoſes that *Cæſar* was an *Uſurper*; and that our *Saviour* reprehended the *Phariſees* for not ſubmitting to him, though he was ſo, and no better: But of thoſe, I have

have now recited, two of them have no Relation to the Title of the *Roman Emperor*; and the last plainly asserts it to be good and unquestionable. Now, if these Opinions are really absurd, and untenable, and by no means fit to be countenanced, in Comparison with that of *Grotius*; let them fare as they deserve; but surely we owe them that Justice, not to condemn them before Examination; which since neither *Grotius* nor Dr. *Higden* have thought fit to bestow upon them, I beg Leave to become an earnest Suiter to the Doctor, that he will retract his Censure, till they have undergone their due Tryal; and then he may proceed against them as he pleases. On the other hand, it is most certain, that *Grotius*'s Opinion is liable to great Objections, which I shall now propose to the Doctor's Consideration.

1. It is plain from our *Saviour's* Answer, that he did not desire, the *Jews* should do more for *Cæsar*, than was consistent with the common Principles of Right and Justice: He bids them *give unto* Cæsar *the Things that be* Cæsar's; that is, give him what is his Due, what he may lawfully claim, and what you yourselves must allow to belong to him, by your own avow'd Maxims and Rules of Equity. He did not pretend to give them any new Laws, by which they should judge of the Titles of Princes; but plainly referrs them to those already in Being for their Direction; and consequently, it is not possible to explain our Saviour's Meaning according to *Grotius*'s Imagination. For where shall we find in the *Old Testament* the least Instance of God's obliging People to be subject to Usurpers? Or how can it be proved, that the Laws of Nature have made it their Duty? It is true, great Endeavours have been used to pass this Deceit upon the World; and Dr. *Higden* has thought it worth his while, to transcribe some of the common Arguments urged for that Purpose; but the Fallacy is easily detected, and has been sufficiently made to appear, to the Satisfaction of reasonable Men. Had our *Blessed Saviour* established the Rights of Princes on any different Foundation, than what they stood upon before; his Will, in a Matter of so great Consequence, would have been clearly reveal'd, and the *Evangelical* Writings would have borne Witness to this Truth, in Terms that could not be controverted: But that Confidence has hitherto proved

vain, which has pretended to any ſuch Diſcoveries; and indeed, had the *Goſpel* introduced any ſuch Innovation as this, the Nature of *Civil Rights* muſt conſequently have been changed; and it would not have been true, which the (*u*) Doctor himſelf confeſſes, that *our Bleſſed* LORD *made no Alteration in Matters of Government; but left the Governments of the World as he found them.*

2. THE Fact upon which *Grotius* founds his Argument, ſeems plainly to be miſtaken by him. He would perſuade us, that *Tribute* was due to *Cæſar*, becauſe he was in Poſſeſſion of *Judæa*; and to prove his Poſſeſſion, he alledges his *Coining* of Money there, as an indiſputable Mark and Token of it: But he ſhould have conſider'd, that amidſt theſe great Changes, which befell the *Jewiſh* Government, (*x*) they ſtill retain'd the Power of *Coining* their own *Money*; and never loſt it till the final Deſtruction of their City under *Veſpaſian*.

NEITHER was this a Favour allowed only to the *Jews*; for there was hardly a City of Note, in the Eaſtern Part of the Empire, which did not enjoy the ſame Privilege; as thoſe who are but moderately skilled in this kind of Learning, are able to bear me Witneſs. A little Inſight into the Cabinets of the Medaliſts will ſhew, that the *Roman Emperors* were well enough contented, their conquer'd Subjects ſhould coin their own Money at their Pleaſure; eſpecially if they took Care to adorn it with their Images, and did not forget to compliment them, upon extraordinary Occaſions, with *Inſcriptions* to their Honour: So that if the Extent of the *Roman* Power and Dominion were to be inferred only from the Number of *Mints*, which were managed by their own proper Officers; we ſhould ſoon reduce it into a very narrow Compaſs: And our *Saviour*'s Anſwer, inſtead of proving that *Tribute* was due to *Cæſar*, would ſerve to a quite contrary Purpoſe; that is, it would plainly ſhew, the *Jews* were a

(*u*) *View*, p. 88.

(*x*) Marqu. Freherus de Numiſmate Cenſûs, p. 16. Quod ſub Græcis Regibus, nominatim autem Demetrio Syriæ Rege, Simoni Sacerdoti magno Judæorum, inter alia privilegia & immunitates, conceſſum legimus (1 Maccab. 15.6.) ſc. *facere percuſſuram proprii Numiſmatis in Regione ſua*; id eis à Romanis ademptum & abrogatum fuiſſe nuſquam legimus. Et J. Seldenus de Jure Nat. & Gent. juxta Hebræos, l. 2. c. 8. p. 224. Ed. Lond. Certè jus cudendæ monetæ etiam tunc [i. e. *in our Saviour's Time*] Ebræis inter privilegia alia exîmia manſiſſe, non immeritò exiſtimant viri docti, nec ante excidium ſub Veſpaſiano ſublatum.

Free

Free People, under no Obligations of Obedience to any foreign Potentate.

If it should be said, that the *Tribute-Money* having *Cæsar's Image* upon it, could not be struck by the *Jews*, their (y) Law absolutely forbidding them to employ themselves in any Works of that Nature: I answer; it will not from thence follow, that the *Romans* did actually coin that Money in *Judæa*, with which their Tribute was paid; for the *Jews* might furnish themselves with a sufficient Quantity of Money for that Occasion, by Exchange and Commerce, as well as if a *Mint* had been set up on purpose in *Jerusalem*, for the *Coinage* of *Roman* Money. Besides, every one of the *Jews* (who were in great Numbers dispersed throughout all Parts of the *Roman* Empire) being obliged by their Law to pay yearly to the *Temple* a Piece of Money; the greatest Part of this Sum was undoubtedly returned in *Roman* Money, which would sufficiently enable them to pay their Civil Tribute; and perhaps this was a great Part of the Employment of the *Money-Changers*, which our *Saviour* drove out of the Temple, *Matth.* xxi. 12.

3. *Grotius* was not always of this Opinion. In his Annotations, indeed, upon the *Gospels*, he seems extremely fond of it; but in his famous (z) Book *de Jure Belli & Pacis*, in that very Passage cited by the Doctor, he pretends only, that *Possession conferrs a Title in controverted and doubtful Cases*; and urges this Answer of our *Blessed Saviour* to prove it; a Matter, which no reasonable Man will ever contest; that Maxim in Law being universally received, that *in rebus dubiis melior est conditio possidentis*. But in his Notes on the *Old Testament* (which may justly be look'd upon as the final Resolution of that *great Man* in several Instances) he clearly disapproves of that Opinion, which affirms *Right* to be the inseparable Attendant on *Possession*; and asserts the contrary. Thus, upon these

(y) J. Selden. de Jur. Nat. juxta Hebræos, l. 2. c. 6. & H. Grotius, ad. 2. Præc. Decalogi.

(z) *This Book was publish'd by* Grotius, *after his Annotations on the* Gospels; *in which it is observable, he does not only speak with more Reserve upon that Text of* Giving to *Cæsar*, &c. *but indeed plainly denies, that a Prince unjustly dispossessed does thereby lose his Right.* Lib. 2. c. 16. sect. 17. Sanè cum Rege initum fœdus manet, etiamsi Rex idem aut Successor Regno à Subditis sit pulsus. *Jus enim Regni penes ipsum manet, utcunque Possessionem amiserit*; quo pertinet Lucani illud de Senatu Romano:

---------- Non unquam perdidit ordo
Mutato sua jura loco. --------

Words

Words of the Prophet *Jeremy* [Jerem. xlix. 1.] *Concerning the* Ammonites, *thus saith the* LORD, *hath* Israel *no Sons? Hath he no Heirs? Why then doth their King inherit* Gad, *and his People dwell in his Cities?* *Grotius* remarks, that they were a clear Determination for *Hereditary Right against Possession.* *From hence* (says (*a*) he) *we learn, that although it is said, that whoever makes himself Master of any Country by Force of Arms, is by the Law of Nations the true Lord and Proprietor of it; yet if the War be unjust, neither the Conqueror, nor those that act under him, are acquitted before* GOD. What can the Doctor's Adversaries desire more, than this Concession of *Grotius*? Is it not from hence plain, that *Possession* against an Antecedent Title will not create a *Right*, which is all they contend for?

4. THIS Opinion, that *wherever any Person has Power enough to coin Money, he is a Lawful Possessor*; must needs have proved so fatal to the *Roman* Empire, that had it been the *Christian* Doctrine, for that Reason alone, the Professors of it would have been treated with the utmost Rigour and Severity, as Enemies to *Cæsar*, and the most dangerous Promoters of Sedition and Rebellion; for considering the Multitude of *Coining Offices* throughout the Imperial Dominions, it was hardly possible for any Rebel to be so unfortunate, as not to be Master of a City, which had a *Mint*; and then he had nothing else to do, but to stamp his *Image* on his Money, in order to become a Lawful Proprietor. But among the great Number of Crimes charged upon the *Christians*, which are carefully recorded by the Primitive Apologists, we no where find, that they were accused upon this Article: On the contrary, to the no little Confusion of those, who advance this Notion, *Tertullian* has expresly assured us, that they abhorred this Doctrine; for (*c*) in his Remonstrance to *Scapula* the *Roman* Governor, he alledges it as an Instance of the Christian Loyalty, that no Man could accuse his Brethren of being *Albiniani*, *Nigriani*, or *Cassiani*; that is, that they had been Adherents to *Clodius Albinus*,

(*a*) Grotius ad Jerem. 49. 1. Discimus hinc, quanquam vulgò dicitur, qui bello terras aliquas cepit, eorum Dominus fieri jure Gentium; id tamen, si bellum sit injustum, neque ipsum capientem, neque alios causam ab eo habentes, apud Deum absolvere.

(*b*) Tertullianus in Lib. ad Scapulam. Sed & circa majestatem Imperatoris infamamur; tamen nunquam *Albiniani*, nec *Nigriani*, vel *Cassiani*, inveniri potuerunt Christiani, sed iidem ipsi, qui per Genios eorum in pridie usque juraverunt, qui Christianos sæpe damnaverant, &c.

Pescennius

Pescennius Niger, or *Avidius Cassius*; the two first of these were Governors of great Provinces, had numerous Armies at their Command, and were elected *Emperors* by them; and all of them *coined Money* with their *Images* upon them, and the Inscription of *Imperatores* and *Augusti*, as is well known to those, who are any thing curious in these Studies, and may be seen in *Mediobarbus*, and other Authors, who treat upon the Subject of *Medals*. Is it not then evident, that the Christians of those Times had not learnt this Doctrine of Paying Allegiance to those, who were in *Possession*, and could shew their *Images on their Money*? Had they understood this to have been the Will and Command of our *Saviour*, they could not have been so stupid, as to boast of their Disowning the Authority of *Pescennius* and *Albinus*, who were as much in Possession of two great Parts of the Empire, as *Septimius Severus* was of a third; but the *Senate* having declared for *Severus*, and required them to obey him only as their *Emperor*, they could not be look'd upon after that, by the (c) *Constitutions* of the *Empire*, as any other than *Usurpers* and Rebels. This was likewise the Case of several other Generals, and Governors of Provinces, who revolted from their Obedience. *Carausius* and *Allectus* were successively Masters of our *Island*, were proclaimed *Emperors* by their Armies, and assumed the Title of *Augusti* in their Coins, which are frequently dug up in this Kingdom; but by the *Roman* Laws they were Traitors; and as such were condemned by all honest Subjects. Now the Question is, how the Christians, who lived under these pretended *Emperors*, should behave themselves. By our *Saviour*'s Law, says the Doctor, they owed Obedience to *Carausius* and *Allectus*, for they were in *Possession* of *Britain*, and could have shewed Money with their *Image and Superscription* upon it, which sufficiently demonstrated their Right; but by the established *Constitution* of the *Roman* Government, they were no better than Rebels; and whoever assisted them, were guilty of the same Crime.

(c) H. Grotius de Jure Belli & Pacis, l. 2. c. 9. sect. xi. Quæ olim jure potuit facere populus Romanus, antequam Imperatores Romani regnarent; idem faciendi jus habuit, ut quisque Imperator mortuus erat, alio nondum existente. Imo & Electio Imperatoris ad populum pertinebat, & aliquoties à populo per se, aut per senatum facta est: quæ autem à legionibus, modò his, modò illis, fiebant electiones, non erant ratæ ex jure Legionum (nam in vulgo nomine jus certum esse non poterat) sed ex approbatione populi. Ubi vide Authoris Annotata.

Thus, as the Doctor has contrived it, the *Christians* of those Ages must have been *of all Men the most miserable* in this World; the Laws of their *Saviour* obliged them to one Thing, and those of the *Empire* to another; and they might very justly have thought such a Condition insupportable.

O wearisome Condition of Humanity!
Born under one Law, to another bound.

By what Expedient will the Doctor now relieve us under these Difficulties? Either we must be govern'd absolutely by the Laws of Christ; or we are bound to obey the *Civil Constitutions* of the Country where we live: If the first is true, then it seems we are to be subject, and swear *Allegiance* to any one, who can shew his *Image* on his *Coin*; but then it will follow, that there never was an *Usurper* in all the Time of the *Roman Empire*: Then it will be false, that our *Blessed Lord intended to make no Change in the Government of the World*, (*d*) which the Doctor thinks an important Truth: And then lastly, to the eternal Reproach of those, who have embraced his *Gospel*, we have found an Instance of a *Christian* Law, which never had any Authority in a *Christian* Nation. But if we are to be govern'd by the *Civil Constitutions* of our Country; and it was never our *Saviour's* Design to destroy their Obligation; to what Purpose then did he give his Disciples a Law, which he knew could never be observed? And to what End has the Doctor urged it, against the known Practice of this Kingdom, as well as that of the *Roman* Empire? For the Proceedings against the *Regicides*, and those who had adhered to *Cromwell*, are good Evidences, that our *Saviour's* Doctrine was never thought to be in Force here; and the Reasons I have mention'd, may be sufficient to prove, it had as little Authority elsewhere. But to put this Matter out of Dispute, in Relation to the *Roman Empire*, I shall beg Leave to put the Doctor in Mind of the Story of the Tyrant *Maximus*, and that in the Words of a very (*e*) learned and judicious Writer.

(*d*) *See the Preface to his* Defence.

(*e*) *The Author of* The Title of a thorow Settlement examined, in Answer to Dr. *Sherlock's* Case of Allegiance, *p.* 77, &c.

(*f*) 'Maximus, after the Murder of *Gratian*, was in 'full Possession of the Western Empire; for *Valentinian* 'left *Italy*, and fled to *Thessalonica*, with his Mother, and 'Probus, the *Præfectus Prætorii*; so that *Maximus* had 'the

(*f*) Sosim. l. 7. c. 13. Socrat. l. 5. c. 11. Theodor. l. 5. c. 12.

the Government of all the West in his Power. St. *Ambrose* was at that Time persecuted by the Empress *Justina*, she being an *Arian*; and *Maximus* pretended to make War upon her Son *Valentinian* in his Behalf; yet no Man was more against the Proceedings of *Maximus*, than (*g*) St. *Ambrose*; and in the Negotiations he twice had with him, he maintain'd *Valentinian*'s Cause with all the Freedom and Courage, that became a Christian Bishop. I know we have been told, (*h*) *that all the Bishops of the West, not excepting the great St.* Martin, *who was called the Apostle of* France, *made their Applications to* Maximus, *and followed his Court, as much, if not more, than they did any Prince's of that Age.* But it is worth taking Notice of, that these Bishops are much blamed for it by *Sulpicius Severus*; he says, they were notorious for their base and servile Flattery; (*i*) and he gives such a Character of *Ithacius*, one of the chief of them, as I wish no other Bishop may ever deserve. But St. *Martin* was of (*k*) another Temper; he frequently refused to accept of his Invitations to his Table; *because he had deprived one Emperor of his Life, and another of his Kingdom*; till at last, when *Maximus* had made the best Excuse he could, casting all the Blame upon the Soldiers, who had forced him to take upon him the Empire; and pretending, there was something more than humane in it; St. *Martin* did condescend to sit at the Table with him; and he at all (*l*) Times hinder'd him, as much as he could, from doing Mischief, and from breaking in upon the Privileges of the Church; which was not owning his Authority: For as *Sulpicius Severus* informs us, (*m*) he rather demanded, than petition'd for what he asked of him. But as the same Author represents him, (*n*) *Maximus* wanted nothing but a good Title, to make him an excellent Emperor; and St. *Martin* was willing to make the best Use of him he could, for the Benefit of the Church.

AFTER the Deaths of *Maximus* and *Eugenius*, St. *Ambrose* (*o*) says of them, *that they were both in Hell*,

(*g*) Ambros. Epist. l. 7. ep. 56.
(*h*) *Bishop of* Sarum's *Pastoral Letter*, p. 13.
(*i*) Sulpic. Severus Hist. l. 2. c. 63.
(*k*) Idem in Vitâ Martin, c. 23.
(*l*) Idem Hist. l. 2. c. 64.
(*m*) Idem in Vitâ Martini, c. 23.
(*n*) Idem in Dialog. c. 7.
(*o*) Ambros. Epist. 58. Et de obitu Theodosii.

teaching,

'*teaching, by their miserable Examples, how sad a thing it is* '*for Subjects to take up Arms against their Prince; of whom* '*it is fitly said, I have seen the Wicked exalted, and lifted* '*up above the Cedars of* Libanus; *and I passed by, and be-* '*hold he was not; for the Righteous Man* (meaning *Theo-* '*dosius* and *Gratian*, whom he just before mention'd) '*passed from the Darkness of this World into Light Eternal;* '*and the Wicked was not, who hath ceased to be unjust.* 'Which must necessarily suppose, that *Maximus* and '*Eugenius* were as guilty in retaining, as in acquiring 'their unjust Possessions; and that they ceased not to be 'unjust, till they died, and were no more in this World. 'It had been strangely uncharitable to have said, that 'they were both certainly damned, because they had 'rebelled some Years before their Deaths; if afterwards 'they became Lawful Emperors, and had so long 'Space for Repentance: But he supposed them to live 'and die in continual Usurpation, and therefore to be 'tormented in Hell after Death, as Usurpers and Re-'bels.

(p) De excidio Britanniæ.

'(p) OUR Countryman *Gildas* too gives such a De-'scription of *Maximus*, as makes him no better, than 'an *Usurper*, from the Beginning to the End of his Go-'vernment; he says, *he was advanced against Law, without* '*any Title, or in a Tyrannical Manner; that he strengthen'd* '*himself by Lies and Perjury, and continued his Usurpa-* '*tion by the Murder of* Gratian, *and the Banishment of* 'Valentinian, *and was the same unjust Usurper to his* '*Death.*

(q) Zos. l. 4.

'(q) *Zosimus* indeed says, that *Theodosius* had consented, 'that *Maximus* should be acknowledged Emperor; and 'commanded his Statues to be set up, that he might, un-'der a Shew of Kindness and Friendship, have the bet-'ter Opportunity to ruin him; but this is against the 'Authority of all other Historians; and *Zosimus* never 'omits any Occasion to defame the Christian Empe-'rors, and particularly *Theodosius*: And besides his Ha-'tred to Christianity, which he exactly copied from '*Eunapius*, whose History he is said to abridge; he 'is singular in other Circumstances, relating to this very 'Story.

'BUT

'(r) But it is more material to obſerve, that *Theodoſius* declared all the Laws and Edicts of *Maximus* to be of no Force or Authority; and that this was no more, than the Chriſtian Emperors uſed to do in ſuch Caſes. Which implies, that the Chriſtians did not think, Tyrants and Uſurpers received any Authority from God; for if they had, all their Acts, which had been according to Natural Right and Juſtice, muſt have been valid, as being made by ſuch as had God's Authority to enact Laws, and decree Juſtice; and it would have been ſinful to declare them void *ab initio*, and of no Effect. For if God had empower'd them to act as Emperors againſt the ſtanding Laws and Conſtitutions of the Empire, he had authorized them to give out Edicts and Decrees, which muſt have been as obligatory in Conſcience, as thoſe of the lawful Emperors themſelves; and whatever they wanted of the Formality of Law, ought to have been ſupplied by the lawful Emperors; and not all their Acts to have been declared invalid, and never to have been of any Authority or Obligation. St. *Ambroſe* was not the Biſhop, who would tamely have ſeen God's Authority in his Vicegerents thus deſpiſed; but *Theodoſius* would have found him the ſame Man, that he did upon ſome other Occaſions, if this had been the Doctrine of the Church."

Thus that worthy Author has very accurately ſhewn, that the Chriſtians did not look upon *Maximus*, as any other than an Uſurper, notwithſtanding the Extent of his Dominions, and the Greatneſs of his Power: And he proceeds to prove, they had no better Opinion of *Eugenius*; though he was much ſuperiour to *Theodoſius* in Strength, and commanded a more numerous Army.

Before I leave this Subject, I would humbly offer it to be conſidered, whether our *Saviour*'s Anſwer to the *Phariſees* would not be more intelligible, and the Force of his Argument better underſtood, if we ſhould ſay, the Money he demanded a Sight of, was coined by the *Jews* themſelves? For then we may conceive, he rea-

(r) Omne judicium quod vafrâ mente conceptum, injuriâ, non jura reddendo *Maximus* infandiſſimus Tyrannorum credidit promulgandum, damnabimus; nullus igitur ſibi lege ejus, nullus judicio blandiatur. Theodoſ. Cod. l. 15. Tit. 14. de infirmandis his quæ ſub Tyrannis aut Barbaris geſta ſunt.

ſon'd with them after this Manner: 'Do you pretend to 'queſtion the Lawfulneſs of Paying Tribute to *Cæſar*, 'who have ſtamped his Image upon your Coins for that 'Purpoſe, after the Cuſtom of Conquer'd Countries? 'You, who have been ſcrupulous in paying this Com-'pliment to the beſt of your Princes, and yet are now 'guilty of a viler Submiſſion, than any others of the '*Roman* Subjects. Behold here your own Act and Deed, 'your own Money witneſſes againſt you, and deter-'mines the Controverſy: For how came *Cæſar*'s Image 'upon your Coin, if you have not acknowledged him 'for your Sovereign? And if he is your Sovereign, why 'ſhould you ſcruple to pay him Tribute? *Render there-'fore to* Cæſar *the Things that be* Cæſar's, *&c.*

In Favour of this Conjecture (for I propoſe it only as ſuch) I have already cited the Opinion of very learned Men, who have been willing to own, that the *Jews* were allowed the Liberty of Coining their own Money by the *Romans*; but it muſt be confeſſed, they are much of a Mind, that it was not conſiſtent with their Laws to ſtamp any Humane Effigies upon it; and conſequently they think it neceſſary to affirm, that the *Tribute-Money* was ſtruck by the *Romans* themſelves. Now, with all due Submiſſion to better Judgments, I ſee no ſufficient Evidence for this Aſſertion: For, *First*, If their (*s*) Law which forbids the Making of any *Graven Image, or any Likeneſs of any Thing that is in Heaven above, or that is in the Earth beneath, or that is in the Water under the Earth*; if this Law, I ſay, muſt be underſtood abſolutely, without any Limitation; then *Aaron*'s *Rod*, and the Pot of *Manna*, or *Incenſe*, which are found upon the *Jewiſh Sicles*, were illegal Images, and not to be defended by the Law of *Moſes*; and then, if they could diſpenſe with themſelves in this Point, why might they not as well allow themſelves the Liberty of Stamping *Cæſar*'s *Image* on their Coin?

(*s*) Exod. xx. 4.

Secondly, If we conſider the End, for which the *Jews* were forbid by their Laws to make any *Graven Images*, it will follow, that it was equally unlawful for them to purchaſe or poſſeſs any *Images* already made by others; for why were they prohibited to make any *Graven Images*, but only leſt they ſhould put them to a Religious Uſe, and worſhip them as the Heathen did? And can it then be

be denied, but the same ill Consequence might follow, if they were allowed to admit and retain in their Houses such only, as were the Workmanship of foreign Artists? Besides, God had as strictly forbidden the Possession of Images, as he had the Making of them; for his Commands are peremptory, that in all their Conquests over the Heathen, they should be sure to (*t*) burn their *Pictures*, and destroy *their graven Images*. What shall we say then to this Case of the *Tribute-Money*, which had *Cæsar's Image* upon it, and yet was as much handled and used by the *Jews*, as any of their own *Sicles*? Is it not then plain, they had no Scruple in carrying about with them their *Emperor's Images* on their Coins? And why then should it be held unlawful for the like Money to come out of their own Mint? We are farther encouraged in this Opinion by the Testimony of the *Jewish* Doctors, who generally agree, that even *Statues* themselves (which certainly are more liable to Objection, than bare Heads upon Medals, and those only *in Profile*) were (*u*) allowable in the Houses of the *Jews*, provided they were kept only for Ornament-sake, as Pieces of Houshold-Stuff, and not upon a Religious Account. And therefore (*x*) *W. Schikard* (an Author well-esteem'd of for his Knowledge in the *Jewish* Customs) has for this very Reason defended the Lawfulness of their stamping an *Image* upon their Coins; and he informs us, that those very *Rabbins*, who would not permit the Possession of entire *Statues*, would yet allow of such *Sculptures*, as had only a Head or Face upon them. *Josephus* indeed seems to be of a contrary Opinion, as if all manner of *Images* were utterly prohibited by the Divine Law, and it were unlawful for a *Jew* to be so much as the Owner and Possessor of them. But (*y*) Mr. *Selden* has observed, that *Josephus* herein, as he does upon many other Occasions, differs from the *Talmudical* Doctors, and therefore his Authority is not great among the *Jews*: Besides, when all the Passages which are urged from his History, upon this Controversy, are duly consider'd, they will be found on-

(*t*) Exod. xxxiv. 13. Numb. xxxiii. 52. Deut. vii. 5.

(*u*) Selden de Jure Nat. & Gent. juxta Hebræos. L. 2. c. 7. & c. 8.

(*x*) W. Schikard Tarich Regum Persiæ, in Proœm. p. 35.

(*y*) De Jure Nat. & Gent. L. 2. c. 8.

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ly to prove, that such *Images* were never to be endured within the *Jewish* Government, which were originally intended for Idolatrous Uses; or were purposely form'd and erected to do Dishonour to the God of *Israel*. Thus for instance, *Josephus* (z) tells us, that when *Pilate* caused some *Roman* Soldiers to march into *Jerusalem* with the *Busts* of *Cæsar* wrought upon their Ensigns, the *Jews* tumultuously exclaim'd against it as an open Subversion of their Laws, and would not be pacified, till he had removed those Occasions of Offence out of their Sight. Now the Reason of this was plain; the (a) *Romans* paid a Religious Worship to their Ensigns; the chief (b) Standard of their *Legions* bore an *Eagle* at the Top of it, in a little Shrine; and certainly was accounted more Sacred by those Idolaters, when the Pourtraitures of their Emperors were the more conspicuous Ornaments of it. So that if we shall still affirm, that the bare Heads of their Emperors (without any Regard to the Divine Honours paid to them) created that Abhorrence in the *Jews*; we shall find it impossible to give a Reason, why those which were upon the *Roman* Coins, should give them no manner of Disturbance. Again, the same Historian (c) relates, that *Herod* having erected a golden *Eagle* over the great Gate of the Temple, the *Jews* look'd upon this as an Affront to their Law, and would not be at rest till they had pull'd it down; but this likewise can only serve to shew, that they thought their Temple profaned by such an Image; and does not prove the Unlawfulness of being Owner of the like Sculptures, when only intended as Furniture for private Houses. I shall only now add, that had it been reputed so high a Crime in a *Jew*, to stamp an Image upon his Coin; either *Agrippa* the *Great* (who is represented to us by (d) *Philo* and (e) *Josephus* as a zealous Observer of the Laws of his Religion) would not have been (f) guilty

(z) Josephus Archæol. L. 18. c. 4.

(a) Tertullian. Apolog. Religio Romanorum tota Castrensis Signa veneratur, Signa jurat, Signa omnibus Diis proponit.

(b) Dion Cassius, l. 40. *speaking of the* Roman *Ensign*, Ἔστι δὲ νεὼς μικρὸς, καὶ ἐν αὐτῷ ἀετὸς χρυσοῦς ἐνίδρυται, &c.

(c) Archæol. l. 17. c. 8. Et de Bello Jud. l. 1. c. 21.

(d) Philo Judæus in Legat. ad Caium.

(e) Archæol. l. 18. c. 7. Καὶ τὰ πάτρια καθαρῶς ἐτήρει· διὰ πάσης γὰρ αὐτὸν ἦγεν ἁγνείας, οὐδὲ ἡμέρᾳ τις παρώδευσεν αὐτῷ τὰ νόμιμα χηρεύουσα θυσίας, &c.

(f) *See an Account of one of his Coins with a Head upon it, and the Inscription* ΒΑΣΙΛΕΥΣ ΜΕΓΑΣ ΑΓΡΙΠΠΑΣ ΦΙΛΟΚΛΑΥΔΙΟΣ, in Hardouin de nummis Herodiadum, p. 15. Et Ez. Spanhem. de Præst. Numism. Diss. 8. p. 523. Vol. 1. fol.

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of it; or *Josephus* (who is forward enough to take notice of any Slips of this Nature in the *Jewish* Princes) would not have fail'd to censure him for it. And now from these Observations I am willing to conclude, that the Conjecture I have proposed, has some Shew of Probability on its side; but nothing will give it a better Countenance, than a Comparison with that, which asserts the *Romans* themselves to have been *Coiners* of the *Tribute-Money*, whereof we are now speaking.

THE common Exposition is this; Cæsar *coins Money now in* Judea, *therefore he is in Possession of that Country; and consequently is the lawful Governor of it.* Here we have the several Propositions in their natural Order, and the full Course of our *Saviour*'s Argument. But if this is a right State of the Matter, it will follow, that our *Saviour* us'd a great deal of Art and Contrivance to prove that, which was not in the Question; for he calls for a Sight of the *Tribute-Money*, and demands what was the *Image* and *Superscription*, for no other End and Purpose, but only to prove, that *Cæsar* was in *Possession* of *Judea*, of which no Man then living in that Country could possibly doubt: For the *Roman* Legions and Governors every where demonstrated, who were their Masters; and would not suffer any Scruples to arise in their Minds upon that Account. But, *Secondly*, it is confessed, the Question put by the *Pharisees* was concerning the Title of these Governors; whether they had sufficient Authority to challenge Subjection, and might be obeyed as Lawful Sovereigns: But to this it cannot be said (according to *Grotius* and his Followers) that our *Saviour* gave any satisfactory Answer; for to affirm (as those Gentlemen have done) that he inferr'd *Cæsar*'s Right from his *Possession*, is to tell the World, that he maintain'd Consequences, which did not follow from their Premises, and introduced a new *Logick* as well as Law.

ANOTHER Conjecture, much favoured by very eminent Authors, is this; That the Inscription upon the *Tribute-Money* was very probably *Judæa Capta*; and therefore the *Jews*, by paying their Taxes in such Coin, did in Effect acknowledge, they were a Conquer'd People, and consequently bound to comply with such Demands of the *Victors*, as necessary for the Preservation of their

Lives, and remaining Liberties; for supposing the *Roman* Conquest never so unjust, it might be lawful however to pay them Tribute; which was the Point the *Pharisees* pretended to be scrupulous in. But this Opinion has the Misfortune to want a Foundation to support it; for, by the Confession of all Learned Men, no such Coin, with *Judæa Capta*, has hitherto been met with, before *Vespasian*'s Reign. (g) *Occo*, it is true, mentions one of *Augustus* with that Inscription upon it, which he believes was coined upon the Taking of *Jerusalem* by *Sosius*: But it is observable, he never saw it; for he does not tell us, what the Metal was; which he never fails to do, when he gives an Account of Medals he had seen, or was well inform'd about them. (h) Mr. *Selden* confesses, he could never hear of any such Coin; and none of the Antiquaries since his Time (after the most diligent Enquiries that could be made) have been able to discover such a Curiosity. Besides, it is not to be imagin'd, that any such Coin should be struck by *Augustus*, or in Compliment to him; for *Jerusalem* was never taken by him, or any of his *Generals*: During the *Triumvirate* indeed, the Eastern Part of the *Roman* Dominions being allotted to *M. Anthony*, he ordered *Sosius*, one of his *Lieutenants*, to lay Siege to *Jerusalem*; who soon made himself Master of it, and placed *Herod* in the Throne; but the Honour of that Action belonged entirely to *M. Anthony* and *Sosius*, not in the least to *Augustus*; who therefore cannot be supposed capable of arrogating to himself the Glory of a Victory, which was by no means his Due.

I RETURN now to the Doctor, who being resolved to dispute every Thing asserted by his Adversaries, calls in Question the Authority of the *Cæsars*, particularly of *Tiberius*; and will not allow him a Right to govern, either the *Romans*, or *Jews*. *If we grant the* Lex Regia *to be genuine*, says our (i) Author, (*which hath been denied in a Tract* de Fictione Legis Regiæ) *yet what is this to* Tiberius's *Title? The* Lex Regia *did not entail the Em-*

(g) Occon. Numism. p. 52. Captis à Sosio Hierosolymis. ΚΑΙΣΑΡ ΑΥΓΟΥΣΤ. caput Augusti ΙΟΥΔΑΙΑΣ ΕΑΛΩΚΥΙΑΣ. Victoria Palma innitens cernua in clypeo hæc scribens.

(h) De Jure Nat. & Gent. l. 6. c. 17.

(i) *View*, p. 89.

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pire on Augustus's *Posterity*; *and if it had*, Tiberius *was none of them.*

HERE we see the Doctor doubts of the Credit of the *Lex Regia*; however he is positive, that *Tiberius* could derive no Benefit from it. But why does he suspect the *Lex Regia* to be a Forgery? Truly for this admirable Reason, because a certain (*k*) *Dutch* Writer has been of this Opinion, in a Treatise upon that Subject. The Doctor should not, methinks, have forgot *Buchanan* upon this Occasion (as good an Author as that he has cited) who, in his Book *de Jure Regni apud Scotos*, first made Objections against the Validity of this Law; but I must beg Leave to tell him, that (*l*) Archbishop *Usher*, (*m*) Mr. *Selden*, and (*n*) Mr. *Thorndike*, (whose Judgment will always deserve as much Regard, as the Person's he referrs to) were of another Persuasion. The Account they give of this Matter, is this; *That in the Beginning of the* Roman *Empire the* Lex Regia *was made, by which the People conferred upon the Prince all manner of Power and Authority*; and this they assure us, is attested by *Ulpian*, and *Justinian*, in his *Institutes*. Besides, there is this day extant in the *Capitol*, a Fragment of that Law, in which the *Powers* bestowed upon *Vespasian* by the *Senate*, are recited; and they are there said to be such, as his Predecessors had enjoyed. Which now of these two Laws will the Doctor, or his Author, have to be a *Fiction*? Is it that mention'd by *Ulpian*? Surely that is impossible; it is not certainly to be imagined, that so eminent a Man would endeavour to impose upon the *Romans* in a Matter they could as easily know as himself. Must we say then, that the Fragment relating to *Vespasian* is a Cheat? But this would not be for the Doctor's Purpose, were it true; and besides, we are well informed of the contrary; for (*o*) *Monseignor Bianchini* (a Person of no mean Figure in the Common-

(*k*) *I guess the Doctor's Author is* Martin Schockius.

(*l*) *The Power of the Prince*, p. 68.

(*m*) Selden's *Titles of Honour*, c. 5. p. 2. p. 591. *and in his Notes on* Fleta.

(*n*) Thorndike's *Review of the Primitive Government of Churches*, c. 12. p. 48, 49.

(*o*) Quamobrem, nec falsi damnaverim fragmentum hoc, quòd non satis prudenter aliqui fecerunt; cum dictione, scripturâ, & notarum Lineamentis convincantur erroris sui; ut duo nostrorum temporum clarissima Romanæ antiquitatis lumina observârunt, *Blanchinus* & *Fabrettus*, quorum Testimonium ad hujus Libri extremum adjiciemus. Vincentius Gravina de ortu & progressu Juris Civilis, ed. Lipsiæ, p. 139.

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wealth of Learning) has given it under his Hand, that after an accurate Examination of that Monument, he found all the genuine Marks and Signs of Antiquity upon it; and wonder'd, that any should suspect it to be a Counterfeit. However, the Doctor asks, *what is this to* Tiberius's *Title?* Now this Question is answer'd by this Fragment of *Vespasian*'s *Lex Regia*; for in it 'we (*p*) 'find (besides the Power (*q*) *of entring into what Leagues* '*and Treaties he pleased*, and many other Privileges) 'the high Prerogative confirmed to him, (*r*) that to 'what Laws soever, either of the Senate or People, it 'was ordained, that the Emperors *Augustus*, *Tiberius*, 'and *Claudius* were not tied, from those he should be 'loose also; which, according to the Mind of the Civi-'lians, is expressed thus;" (*s*) *They are loosed from the Laws* (*as the Letter of their own Language speaks*) *that is, they are free from all coactive Obedience to them, and are held by none of the written Ordinances.* From whence it is evident, that *Vespasian* was to enjoy the same Privileges and Prerogatives, that *Augustus* and *Tiberius* did; but they had no Prerogatives, but what were given them by the Senate and People; and because all the several Branches of the *Imperial* Authority were specified in the Grant, the ancient *Lawyers* gave it the Name of *Lex Regia.* But I shall not contend with the Doctor about this Nicety; for I do not conceive it to be at all material, by what Appellation the *Law* was distinguished, which conferred the Sovereign Authority upon *Tiberius*, provided the Fact can be proved, that by some such publick Instrument they did really part with their (*t*) Liberties, and devolve all their Power upon that Emperor. Now I think this may be demonstrated beyond all Contradiction, not only from this Inscription, but also from the *Roman* Historians, who abundantly supply us with Evidence for this Purpose.

(*p*) *These are Archbishop* Usher's *own Words, in his* Power of the Prince, p. 68.

(*q*) Fœdusve cum quibus volet facere liceat. Vide Gruteri Inscript. Tom. 1. p. 242. Ed. Amstel. 1707.

(*r*) Utique quibus Legibus plebisve scitis scriptum fuit, ne *Divus Augustus, Tiberiusve Julius Cæsar Augustus, Tiberiusque Claudius Cæsar Aug. Germanicus* tenerentur, iis Legibus plebisque scitis *Imp. Cæsar Vespasianus* solutus sit, ibid. Vide etiam Dion. Cass. l. 53. p. 516.

(*s*) Dion Cassius, Hist. Rom. l. 53. Λέλυω δὴ νόμων, ὡς αὐτὰ τὰ Λατινικὰ ῥήματα λέγει, τουτέστιν, ἀπὸ πάσης ἀναγκαίας νομίσεώς εἰσι, καὶ οὐδενὶ δὴ γεγραμμένων ἐνέχονται.

(*t*) Dion Cassius, l. 53. p. 518, 519.

Upon the Death of *Augustus*, nothing was ever more remarkable, than the Contention between the People of *Rome* and *Tiberius*; the first in their Endeavours to impose, the latter to decline the Empire. The (*u*) Senate fell upon their Knees to him upon that Account; and the ablest of their Orators solicited him in the most earnest and importunate manner, to take the Government upon him; so that at length he was rather subdued, than persuaded; and it seem'd evident, that he accepted of the Imperial Dignity more to gratify others, than to please himself. (*x*) It was wonderful to see, with what Haste and Precipitation Persons of the highest Rank and Quality labour'd to part with their Liberties: The *Consuls* first began to take the Oath to him; soon after the *Senate*, the *Soldiers*, and the *People*; and all this Forwardness was shewn, before he would vouchsafe to give them Hopes of being their *Emperor*. He was no sooner upon the Throne, but the *Senate* offer'd him (*y*) all manner of Honours, Titles, and Powers; and in a word, no *publick Act* was done by him, which could not sufficiently be warranted and justified by his (*z*) *Tribunitian*, *Consular*, *Proconsular*, and *Pontifical* Authority, or that of some other Offices, with which he was invested by Decrees of the *Senate*. So that the Doctor will be hard put to it to prove, that *Augustus* had more Authority conferred upon him by the *Senate*, than they gave to *Tiberius*; Indeed we may venture to say it, that the *Senate* was never more profuse in their Oblations to any Emperor, than they were to *Tiberius*; and therefore if their Consent and Approbation was sufficient to make him a *Rightful* Governor, he certainly had it in as great a Degree, as his Predecessor could pretend to. Is it not then surprizing, what the (*a*) Doctor tells us, that *Tiberius wound himself into the Government, and the Submission of the* Romans *(such as it was) was his only Title?* As if the *Romans* had ever made an humbler *Submission* to any of their *Emperors*; and the *Submission* of a People that had

(*u*) Tacit. Annal. l. 1. c. 11. Sueton. in Vitâ Tiberii, c. 24. Tandem quasi coactus, & querens miseram & onerosam sibi injungi servitutem, recepit Imperium.

(*x*) Tacit. Annal. l. 1. c. 7. Romæ ruere in Servitium Consules, Patres, Eques. Quanto quis Illustrior, tanto magis falsi ac festinantes. Consules primi in verba Cæsaris juravere, mox Senatus, milesque & Populus.

(*y*) Dion Cassius, l. 57. p. 602, 607. & l. 58. p. 629, 632.

(*z*) Dion Cassius, l. 53. p. 508, 509. c. 518, 519.

(*a*) *View*, p. 90.

their Liberties entirely at their own Disposal, were not sufficient to create a *good Title.*

His next Question is, (*b*) *Whether the* Romans *themselves were Rightful Governors of* Judæa? And the Reason of his Doubt is, because *there appears no express Act of the Resignation of the Sovereign Power to the* Romans, *like that of the* Lex Regia *to* Augustus. If nothing less than the very Instrument of Resignation will satisfy the Doctor, we cannot help it; but there are many other Learned and Judicious Men in the World, who will be contented with (*c*) *Josephus*'s Authority in this Matter. I need not trouble the Reader with all the Particulars of this Piece of History; for what Reasons *Pompey* laid Siege to *Jerusalem* and took it; and how the *Jews* came first under Subjection to the *Romans*: It is certain, that *Hircanus*, their Lawful King, was the great Instrument of bringing them under this Yoke; for it was his Party, that surrender'd *Jerusalem* to *Pompey*; and by his Consent the *Romans* were first admitted into a Share of the Government of that Country; and he contented himself with the Title of (*d*) King, under the *Roman* Protection: Upon this Account (*e*) learned Men have affirm'd, that the *Jews* made a *Dedition* of themselves at that Time, and were ever after bound, by their own voluntary Act, to pay Obedience to the *Romans*, as their lawful Masters and Governors. By Virtue of this Power and Authority, *Augustus* constituted *Herod* King of *Judæa*, and afterwards his Son *Archelaus*; but not long after *Archelaus* being deprived of his Kingdom, and sent into Banishment, (*f*) *Judæa* was then first reduced into the Form of a *Roman Province* by *Augustus*; and the Government of

(*b*) *View*, p 90.

(*c*) *He says, the whole Nation of the* Jews *swore to* Augustus, *and* Herod, *excepting the Pharisees.* Archæol. l. 17. c. 3.

(*d*) Dion Cassius, p. 37. & Joseph. l. 1. de Bello Jud. c. 8.

(*e*) *The Author of the* Exercitation concerning Usurped Powers, *p.* 87. *Ed.* 1650, 4to. *And Doctor* Hammond *on* Matth. xxii. *v.* 16.

(*f*) If. Casaubon. exerc. adv. Baronium, App. N. 6. Exerc. I. *And* Josephus *informs us*, (Archæol. l. 17. c. 12.) *that this was what the* Jews *themselves desired, upon the Death of* Herod; *for they sent an Embassy to* Augustus, *of Fifty of the principal Men of their Nation, beseeching him, that they might be no longer govern'd by Kings, but for the future, as a Part of the Province of* Syria, *their Country might be under the Administration of a* Roman *Magistrate, appointed by the* Emperor; *and in this Request they were seconded by Eight Thousand* Jews, *who were then Inhabitants of* Rome. Ἦν δὲ κεφάλαιον αὐτοῖς τῆς ἀξιώσεως, βασιλείας, καὶ ἧς ἐν ἀρχῇ ἀπηλλάχθαι, παρῃτήκεσαν τοῖς Συρίας γεγονότας, ἐπιτάττεσθαι τοῖς ἐκεῖσε πεμπομένοις στρατηγοῖς. *Which is another very remarkable Instance of their voluntary Subjection to the* Romans.

it

it committed to a *Procurator* under the *President* of *Syria*. This was the State of the *Jews* at the Time of our *Saviour*'s Death, and for some Years before; and whatever the Doctor may think of it, there was no Conscientious *Jew* then in Being, but might safely have sworn Allegiance to the *Roman Emperors*. For what Prince, or Family would have been injured by it? Or was there any one living, who could pretend a better Right to the Sovereign Power over them? The Sons of *Herod* were under an absolute Dependency upon the *Cæsars*, and therefore could not presume to lay any Claim to that Monarchy; and the Race of the (g) *Asamonæi*, the old Hereditary Kings of the *Jews*, was entirely extinct: The *Romans* therefore could not possibly be *Usurpers*, when no *Title* could be set up against them; and for that very Reason were lawful *Possessors*; because no Proprietor was in Being, who could charge them with doing him Injustice. In this Case, *Self-Preservation*, and the *Publick Good* (Principles too often abused upon other Occasions) did oblige the *Jews* to submit to the *Romans*, and acknowledge their Authority, even though they had never before yielded themselves up to their Government; for though, upon the utter Extinction of a *Royal* Family, Subjects are at Liberty to choose the next Successor who shall reign over them; yet if any Person, in such a Juncture, shall get *Possession* of the *vacant* Throne, even by Force and Violence; it is then so much for their Interest, that it becomes their Duty, to comply with the Necessity of Affairs, and suffer him to be their King, whom they cannot attempt to depose, without the apparent Ruin of their Lives and Fortunes. Thus the Doctor sees, his Adversaries are willing to allow, that *Possession* gives a Right in certain Cases; *viz.* when the Subjects preserve themselves by yielding Obedience to the King *de Facto*, without violating the Rights of a Third Person: But this Concession will do him no

(g) Josephus *assures us*, (Archæol. l. 15. c. 9.) *that for this Reason* Herod *destroyed* Hircanus, *because his Right and Title to the Kingdom of* Judæa *by Blood was unquestionable; a little before that, he had caused* Aristobulus (*the Grandson of* Hircanus) *to be drown'd*, Archæol. l. 15. c. 3. *Soon after he dispatches his own Wife* Mariamne, *Sister to* Aristobulus; *and having exercis'd the same Cruelty upon the Children of* Baba, *the Historian says, there was not then one left of the Kindred of* Hircanus. Ὥστε οὐδὲ μηδὲν ὑπόλοιπον ἐκ τῆς Ὑρκανοῦ συγγενείας, ἀλλὰ τὴν βασιλείαν αὐτεξούσιον αὐτῷ, μηδένος ὄντος ἐπ' ἀξιώματος ἐμποδὼν ἴσαδαι τοῖς δεδρωμμένοις.

Good

Good in his main Question, and hurts him in that which concerns the Authority of the *Roman* Emperor, over the *Jews*; for in this latter Case, as I have now stated it, it was plainly lawful for them at least, to become their Subjects; and every thing rightly consider'd, their Duty too. It should be observ'd, that had the *Romans* withdrawn their *Legions* and Protection, at *Herod*'s Death, and abandon'd the *Jews* to their own Conduct and Disposal; the Sons of *Herod* would soon have torn their Country in Pieces; and whoever had prevail'd, had ruled them with the utmost Degree of Tyranny. On the other hand, they had long Experience of the Humanity and Goodness of the *Romans* to them, by many extraordinary (*h*) Decrees made in their Favour; and (*i*) *Philo Judæus* has given us a large Account of the particular Kindnesses shew'd to them by *Augustus* and *Tiberius*; so that had they been left to their free Choice, they could not have made a wiser, than to live under the Government of those *Emperors*. The Doctor indeed fancies, it will be some Refuge to him to (*k*) say, that the *Jews were forced to this Submission to a superiour Power*; but I have shewn, it was their Interest; and certainly that Violence is very agreeable and obliging, which compels Men to do Things, that are highly for their Advantage; that is, as becomes Rational Creatures. But should we allow it to be true, that this Submission of the *Jews* was forced and extorted; it cannot possibly do the Doctor any Service. For will he say, that Promises and Oaths obtain'd by Violence, from a People that had Power to make them, are of no Obligation? What then will become of Leagues and Treaties between Princes, after a long and bloody War, when disadvantageous Conditions of Peace are imposed upon the unsuccessful Party, and they must either accept of them, or resolve to prosecute the War to their evident Ruin? Will the Doctor maintain, that these Treaties are Void and of no Effect, and that the Princes, who were forced to comply with these Terms, may lawfully have Recourse to Arms again, whenever they see an Opportunity? The Doctor knows, that *Grotius*, and *Sanderson*, and all the ablest Casuists are of another Opinion; and he will find it difficult to answer their Arguments. I shall only beg Leave to put him in mind, upon this Occasion, of the Judg-

(*h*) Vide *Decreta Romana, &c. pro Judæis*, nuper à Gronovio edita.

(*i*) In Legat. ad Caium.

(*k*) *View*, p. 90.

Judgment of two great Historians, relating to this Question.

Francis I. King of *France*, having been taken Prisoner by the Emperor *Charles* V, was some time after set at Liberty upon his *Parole* of Honour, by which he obliged himself to return again to the *Emperor*, if the Conditions were not perform'd, upon which he was released. But *Francis* being once at Liberty, pretended he was not bound by the Promises he had made in Captivity, affirming, *that no Man under Ward could plight his Faith*: Upon which my (*l*) Lord *Herbert* makes this Reflexion: *Nevertheless, I must not omit to say, that the Excuse of* Francis *was not generally approv'd of, nor his Cartel thought just; for if a Prisoner of War may avoid his Promise, because he made it under a Constraint, it would follow, that few or none would be taken Prisoners, but kill'd upon the Place; which would make the War not only more bloody and barbarous, but even destroy a principal Part of that* Jus Gentium, *which in these Cases has been inviolably observ'd in all Times.*

(*l*) *Life of* Henry VIII. ad ann. 1528.

The other Historian is the present Bishop of *Salisbury*, who tells us, That King *Henry* VIII. having prevail'd with the *Convocation* to annull his Marriage with the Lady *Anne* of *Cleves*, one of the Reasons which influenced that Assembly was this, (*m*) *That the King having married her against his Will, he had not given a pure, inward, and complete Consent: And since a Man's Act is only what is inward, extorted or forced Promises do not bind.* But the Bishop's Censure upon these Proceedings is remarkable. *This was* (says his (*n*) Lordship) *the greatest Piece of Compliance, that ever the King had from the Clergy; for as they all knew, there was nothing of Weight in the Præ-Contract; so they laid down a most pernicious Precedent for invalidating all Publick Treaties and Agreements: Since if one of the Parties being unwilling to it, so that his Consent were not inward, he was not bound by it; there was no Safety among Men more. For no Man can know, whether another consents inwardly: And when a Man does any thing with a great Aversion, to inferr from thence, that he does not inwardly consent, may furnish every one with an Excuse, to break loose from all Engagements; for he may pretend he did it unwillingly.* Lastly, The Doctor has acknowledged, that *Zedekiah* and the *Jews* submitted to the King of *Babylon*,

(*m*) *Bishop* Burnet's Hist. Ref. *Part* 1. *b.* 3. *p.* 280.

(*n*) Ibid. *p.* 281.

and took an Oath to him, before God had commanded them to do so: But surely they did not make this Submission willingly; it was the (*o*) Effect of Force and Violence, which they must either have complied with, or exposed themselves to utter Ruin: May we say therefore, with the Doctor, that their Oaths and Engagements signified nothing, and could not bind them against the Interest of their Country? But the (*p*) Prophet has taught us another Doctrine, he tells us God was highly incensed by the Violation of the Oath and Covenant made to the King of *Babylon*, and threatens them with the Severity of His Vengeance upon that Account. The Prophet's Words are remarkable, and therefore I shall conclude with them. *Shall he prosper? Shall he escape that doth such things? Or, shall he break the Covenant, and be deliver'd? As I live, saith the* Lord God, *surely in the Place where the King dwelleth, that made him King, whose Oath he despised, and whose Covenant he brake, even with him, in the midst of* Babylon *shall he die. Seeing he despised the Oath, by breaking the Covenant (when lo! He had given His Hand) and hath done all these things, he shall not escape.*

(*o*) 2 Chron. xxxvi. 13. *It is said, That* Nebuchadnezzar *had made* Zedekiah *swear by God to him.*

(*p*) Ezek. xvii. 15, *&c.*

APPENDIX.

APPENDIX.

Numb. I.

Ad p. 96.

A Passage out of Sir *J. Fortescue*'s Defence of the Title of the House of *Lancaster*. *MS. Bibl. Cotton. Otho*, B. 1.

POST Henrici 5ti fata Christianissimus Princeps Henricus 6tus, ejus filius & Hæres, Parentum suorum æquo & justo titulo, in jure Coronæ & Regni Angliæ successit; tenerrimâque ætate in Regni ejusdem Regem, nullo contradicente, sed uno omnium applausu, unctus & coronatus est. Cui etiam adhuc inter ubera volutanti, & nondum coronato, præfatus Edmundus Comes Marchiæ, tanquam hæredi ejusdem Henrici 5ti, Regique ac Domino suo supremo, cum omni humilitate ultro ligeum fecit homagium, & ad hoc faciendum quàm celerrimè potuit libentissimè properavit.

Posteà verò dicto Edmundo Comite sine Hæredibus de corpore suo exeuntibus à rebus humanis exempto, Richardus nuper Dux Eboracensis, Pater istius Edwardi, & nepos istius Edmundi, viz. filius Annæ sororis suæ, tanquam proximus sibi hæres, in Cancellariâ ejusdem Regis Henrici 6ti, secundum modum Curiæ illius, possessionem dicti Comitatûs sibi, tanquam proximo hæredi ipsius Edmundi, ab eodem Rege, tanquam à Domino suo supremo, deliberari petiit & obtinuit. Et ob hoc eidem, ut suo Regi & supremo Domino, Homagium Ligeum fecit; & postea, suis indenturis, Sigillo armorum & signo suo manuali signatis, dicto Regi suo Henrico 6to se obligavit, de se fideliter gerendo & habendo in officio Locum Tenentis sui in Franciâ, quod & diu fecit. In quibus scriptis ipsum Henricum Dominum suum supremum, Angliæque & Franciæ Regem

 nomi-

nominabat. Posteaque à partibus Franciæ ad Angliam reversus, similibus suis scriptis indentatis, suoque sigillo armorum unà cum signo manuali suo signatis, ad fideliter serviendum eidem Domino suo supremo in officio Locum-tenentis sui in Hiberniâ, quoad placeret Regi ipsum revocare, omnibus modo, viâ, & formâ juris, quibus melius potuit, se astrinxit & obligavit; Ipsumque Regem Henricum Sextum, in illis etiam scriptis suis, supremum Dominum suum, Regemque Angliæ & Franciæ, semper profitendo, nominavit.

Iterùm etiam, dum Rex Henricus tantâ ægritudine vexatus fuerat, quòd Regni sui gubernaculis personaliter intendere non valuit; dictus Richardus Dux Eboracensis, scriptis suis sigillo armorum, suoque signo manuali notatis, ipsum Regem sponte Dominum suum supremum, Regemque Angliæ & Franciæ nominavit; & in publico Parliamento, durante infirmitate illâ, Protectoris & Defensoris Angliæ officium, auctoritate ejusdem Parliamenti, in se assumpsit, pleno corpore Regni in Parliamento illo, & secundum jura Angliæ repræsentato; & dictum Christianissimum Principem Henricum Sextum, Regem Angliæ, suumque supremum Dominum in plenâ Curiâ Parliamenti illius de Recordo appellavit; cúmque tunc temporis Rex ipse, obstante infirmitate prædictâ, nullum sibi ad sic faciendum timorem incutere potuit.

Item idem Richardus, vicæ repetitâ, supra sacrum Corpus Christi sacramentalitèr visum juravit, quòd semper fidelis subditus & Ligeus esset eidem Regi suo Henrico Sexto, & pro posse suo defenderet & adjuvaret, atque pro viribus suis totis ad Statûs sui Regii conservationem incrementumque ageret, & ad ejus confirmationem Corpus Christi recepit. Quibus juramentis non modò corpus, sed animam suam, suumque honorem strictiùs fortiúsque, quàm aliquo temporali vinculo potuit, obligavit.

Edwardus etiam iste filius suus, jam Regni Usurpator, consimilitèr in præsentiâ Cleri totius Provinciæ Cantuariensis, ad tunc convocati in Ecclesiâ S. Pauli Londonij, super crucem Cantuariensem juravit solemnitèr, quòd semper honoraret Dominum suum supremum Regem Henricum 6tum, ipsumque pro Rege Angliæ ac Domino suo supremo acciperet, & sibi humilitèr, ut Regi suo, totâ vitâ suâ obediret, & posteà in publico Parliamento juramentum suum repetiit paritèr & renovavit.

Ex quibus præmissis liquet æquo intuentibus lumine, quòd si Progenitores Edwardi hujus nunc usurpantis, à principio jus aliquod ad coronam & regnum Angliæ habuissent, quemadmodum

dum nunquam habuerunt, ab illo tamen jure per promissiones & affirmationes suas, sub sigillis & signis suis manualibus roboratas, per Renunciationes spontaneas, tam tacitas quàm expressas, etiam in Parliamento & Convocatione Cleri, quæ maximæ auctoritatis sunt, affirmatas, & per juramenta solemnia sponte facta, recessum est plenariè & absolutè: Adeóque si habuissent jus, prout non habuerunt, omnis tamen via petendi illud, eis eorum facto proprio præclusa est, idemque jus in lege adnihilatum extat & extinctum.

NUMB. II.

Ad p. 96.

The whole Proceedings of Richard *Duke of* York's *Claim of the Crown against* Henry VI, *and the Judgment of the House of Peers thereupon, as it is transcrib'd from the Parliament Rolls in Dr.* Brady's Enquiry into the remarkable Instances of History, and Parliament Records, *used by the Author of* The Unreasonableness of a New Separation on Account of the Oaths, *&c. p.* 31. *to* 39. *With Dr.* Brady's *Inferences from thence against that Author.*

Memorand. THAT the xvj day of *Octobre*, the ix day of this present Parlement, The Counseill of the right high, and mighty Prince, *Richard Duc* of *York*, brought into the Parlement chambre a Writeing, conteigning the cleyme and title of the right, that the seid *Duc* pretended unto the Corones of *Englond*, and of *France*, and Lordship of *Ireland*; and the same Writeing delivered to the right reverent fadre in God *George* Bishop of *Excestre*, *Chauncellour* of *Englond*; desiring him, that the same writeing might be opened to the Lordes Spirituelx and Temporelx assembled in this present Parlement; And that the seid *Duc* myght have brief and expedient answer thereof: wheruppon the seid *Chauncellour* opened and shewed the seid desire to the Lordes Spirituelx and Temporelx; askyng the Question of theym, whether they wold, the said writeing shuld be openly radde before them or noo. To the which Question it was answered and agreed by all the seid Lordes, Inasmuch as every persone high and lowe, suying to this high Court of Parlement, must be herd, and his desire and peticion understand, that the seid writeing shuld be radde and herde, *not to be answered without the King's Commaundement,*

Rot. Parl. 39 H. 6. n. 10.

maundement, for so much as the matter is so high, and of so grete wyght and poyse; which writeing there than was radde; The tenour whereof followeth in these words:

n. 11. *It is not to be forgotten*, &c. as in *Numb.* 19. followeth.

n. 12. And afterward the xxvij day of *Octobre*, the x day of this present Parlement, the seid *Chauncellour* shewed and declared to the seid Lordes Spirituelx and Temporelx, being in the same Parlement, how that the Counseill of the seid *Duc* of *York* gretly desired to have answer of such writeing, as upon the xvj day of *Octobre* last passed was put into this present Parlement, on the behalf of the seid *Duc*; and thereupon asked the seid Lordes, what they thought was to be doon in that matier. To the which Question it was answered, and thought by all the seid Lordes, *That the matier was so high, and of such wight, that it was not to eny of the King's Subgetts to enter into communication thereof, without his high commaundement, agreement, and assent had thereto.* And ferthermore, forasmuch as the seid *Duc* desired and required brief and undelaied answere of the seid wryteing, and in eschueing and avoyding of grete and manyfold inconveniences, that weren lykly to ensue, if hasty provision of good answere in that behalfe were not had; it was thought and agreed by all the Lordes, that they all shuld goe unto the King, to declare and open the seid matier unto his Highness, *and to understand what his good Grace wold to be doon ferther therein.* And theruppon incontinent all the seid Lordes Spirituelx and Temporelx went unto the King's high presence, and therunto opened and declared the seid matier by the mouth of his seid *Chauncellour* of *England*; and the seid matier by the King's Highness herd and conceyved, *It pleased him to pray and commaunde all the seid Lordes, that they shuld serche for to fynde, in as much as in them was, all such things as myght be objecte and laide ayenst the cleyme and title of the seid Duc.* And the seid Lordes besaught the King, that he wold remember him, yf he myght fynd eny resonable matier, that myght be objected ayenst the seid cleym and title, in so moche as his seid Highness had seen and understonden many divers Writings and Chronicles; wheruppon on the morne, the xxviij day of *Octobre*, the xj day of this present Parlement, *the foreseid Lordes sent for the King's Justices into the Parlement-chambre, to have their Avis and Counseill in this behalf*; and there

delivered

delivered to them the writeing of the cleyme of the ſeid *Duc*, and in the King's name gave them ſtraitely in commaundement, ſadly to take aviſament therin, And to ſerche and find all ſuch objections, as myght be leyde ayenſt the ſame in fortefying of the King's right.

Whereunto *the ſame Juſtices*, the *Monday*, the xx day of *Octobre* then next enſuing, for their aunſwere upon the ſeid writeing to them delivered ſeiden, that they were the King's Juſtices, and have to determine ſuch matiers as come before them in the Law; between partie and partie they mey not be of Counſeill: And ſith this matier was betweene the *King* and the ſeid *Duc* of *York* as two parties, and alſo it hath not be accuſtumed to calle the Juſtices to Counſeill in ſuch matiers; *and in eſpeciall the matier was ſo high, and touched the King's high Eſtate and Regalie, which is above the law, and paſſed their lerning, wherefore they durſt not enter into eny communication thereof*; for it *perteyned* to the Lordes of the King's blode, and thapparage of this his lond, to have communication and medle in ſuch matiers; And therefore they humble byſought all the Lordes, to have them *utterly excuſed* of any avyce or counſeill by them to be yeven in that matier.

And then the ſeid Lordes, conſidering the aunſwere of the ſeid *Juges*, and entending to have the avice and good counſeill of all the King's Counſeillours, ſent for all the King's *Sergeaunts*, and *Attournay*, and gave theym ſtraight commaundement in the King's name, *that they ſadly and aviſely ſhuld ſerche and ſeke all ſuch things, as might be beſt and ſtrengeſt to be allegged for the King's availe, in objection and defetyng of the ſeid title and cleyme of the ſeid Duc.*

Whereunto the ſeid *Sergeaunts* and *Attourney*, the *Wenſday* then next enſueing, anſwered and ſeiden, that the ſeid matier was put unto the King's *Juſtices*, and how the *Monday* laſt paſſed the ſame *Juſtices* ſeiden, and declared to the ſeid Lordes, that the ſeid matier was ſoo high, and of ſo great wight, that it paſſed ther lerning; and alſo they durſt not enter eny communication in that matier, to yeve any avyce or counſaill therein: *And ſith that the ſeid matier was ſo high, that it paſſed the lerning of the Juſtices, it muſt needs excede ther lerning; and alſo they durſt not enter eny communication in that matier*, and prayed

and besought all the Lordes to have them excused of yevyng eny avyce or counsaill therin.

To whom it was aunswered, by the avys of all the Lordes, by the seid *Chaunceller*, that they myght not so be excused; for they were the King's perticuler Counsaillers, and therfore they had ther fees and wages: And as to that the seid *Sergeaunts* and *Attourney* seiden, that they were the King's Counsaillers in the Law, in such things as were under his auctorite, or by Commission; *but this matier was above his auctorite, wherein they myght not medle*, and humbly besought the seid Lordes to have them excused of yevyng eny counsaill in that matier: and it was aunswered them agayn, that the Lordes wuld not hold them excused, but let the King's Highness have knowleche what they said; and theruppon the seid *Chaunceller* remembred the Lordes Spirituelx and Temperelx of the seyings and excuses of the *Justices*, and seyings and excuses of the *Sergeaunts* and *Attourney*, *and also the grete commaundement of the King's Highness, that they had, to find all such objections, as myght be mooſt mighty to defend the King's right and title, and to defete the title and cleyme of the seid Duc of* York; And also that the King myght understond, that the seid Lordes diden their true and faithful devoire and acquitall in the seid matier, *desired all the Lordes that every of them shuld sey what he cowed sey in fortefying the King's title, and in defeteing of the cleyme of the seid Duc*: And than it was *agreed* by all the Lordes, that every Lorde shuld have his fredome to sey what he wold sey, without eny reporting or magre to be had for his seying; And theruppon after the seiyng of all the Lordes every after other, It was concluded, that thes matiers and articles, here undre writen, shuld be aleged and objecte ayenst the seid cleyme and title of the seid *Duc*.

Objectio contra titulum prædictum.

1. *First*, It is thought, that the Lordes of this Lond must needes call to their remembraunces, *the grete othes the which they have made to the King our Soveraigne Lorde*, the which may be leyde to the seid *Duc* of *York*; and that the Lordes *may not breke thoo othes*.

2. *Item*, It is thought also, that it is to be called to remembraunce the grete and notable *Acts of Parlements*, made in divers Parlements of divers of the King's Progenitours, The which Acts be sufficient and resonable to be leyd againe the title of the seid *Duc* of *York*. The which

which Acts been of moche more auctorite than any Chronicle, *And also of auctorite to defete eny manner of title be made to eny persone.*

Item, It is thought, that there is to be leyd agayn the seid title *divers entaills made to the heires males*, as for the *Corone* of *Englond*, as it may appere by divers Cronicles and Parlements. 3.

Item, It is thought, yf the seid *Duc* shuld make eny title or cleyme by the Lyne of Sir *Leonell*, that the same *Duc* shuld bere the Armes of the same *Leonell*, and not the Armes of *Edmund Langley*, late *Duc* of *York*. 4.

Item, It is to be allegged agen the title of the seid *Duc*, that the time that King *Herry* the fourth toke upon him the *Corone* of *Englond*, *he said he entred and toke upon him the Corone as right enheriter to King* Herry *the third*, *and not as a Conquerour*. 5.

To the which Articles the seid *Duc* of *York* gave his answeres in writeing as folowen.

Here under folowen the answeres of *Richard Plantagenet*, called commonly *Duc* of *York*, &c. to certain raisons and colours alleged, as it is seid, ayenst the matier of his right and title, *&c.* Responsiones præfati Ducis ad Objectiones tituli sui prædicti. n. 14.

First, Where it is seid, that it is thought, that the Lordes must nedes calle to their remembraunce the *grete Othes which they have made to the King*, which may be leid to the seid *Duc*, and that they may not breke thoo othes.

The seid *Richard* aunswereth and saith, that every man, under the peyne of everlasting dampnation, is bounde to obey to the lawe and commaundements of God, by the which lawe and commaundements trouth and justice owe to be preferred and observed, and untrouth and injustice laid apart and repressed: and soe it is, that of this bond, and duetye of obedyence to God's lawe, *noo man may discharge himself by his owne deede or act, promise or ooth*; for elles of the contrary wold ensue *innumerable inconveniencies*; wherefore sith it is so, that the matier of the title and cleyme of the seid *Richard Plantagenet* is openly true, and lawful, and grounded upon evident trouth and justice; It followeth, that man shuld have rather consideration to trouth, right, and justice in this matier, accordingly with the will of the law of God, then to any promisse or ooth made by him to the contrarie, considered namely,

namely, that by the lawe and determination of holy Church an ooth made by oon perſone unto the prejudice or hurt of an other, contrarie to trouth, juſtice, and charity, in the which ſtandeth the plentitude and perfection of Godd's lawe, is void and of noon effect, neither in eny wiſe obligatory; And that the vertue and nature of an ooth *is to confirm trouth, and in no wyſe to impugne it*; And over that *by the ooth of feaute, homage, or ligeaunce, no man is bounden to any inconvenient or unlawfull thing*; And how be it that this anſwer is ſufficient to all maner objections that may be made ayenſt his cleyme and entent in this partie by reaſon or occaſion of any ooth, yet natheleſs the ſeid *Richard*, for as much as the matier of othes is a matier ſpirituell, for more declaration of his conſcience, honeſty, and trouth in this partie, offreth himſelf redy to aunſwer before eny Juge Spirituell, competent in place, and tyme covenable, to all maner of men, that eny thing woll purpoſe ayenſt him in that behalf.

And to ſhew clerely, *that lawfully withouten offence of God and conſcience he may cleyme and purſue his right, and deſire Juſtice, in ſuch fourme as he dooth, and that all other perſones, and namely the Peers and Lordes of this Reame may, and by the law of God and man ought to helpe, and aſſiſt him in trouth and juſtice, notwithſtand any ooth of feaute, or other by him or them here before made.*

n. 15. Over this, where it is thought alſo, that it is to be called to remembraunce the *grete and notable Acts of Parlement*, made in dyvers Parlements of dyvers of the King's progenitours, the which actes been ſufficient to be levyed ayenſt the title of the ſeid *Duc*, and of more auctorit ethen eny Cronicle, And alſo of auctorite to defete any maner title made to eny perſone:

And alſo where 'tis ſaid, that it is to be leyde ayenſt the ſeide title dyvers entailles made to the heirs males, as for the *Corone* of *Englond*, as it may appear by dyvers Cronicles and Parlements:

The ſeid *Richard Plantagenet* aunſwereth and ſaith, that in trouth ther been noo ſuch actes and tailles made by eny Parlement herebefore, as it is ſurmyſed; *but only in the* vij*th year of King* Herry *the fourth a certeyne act and ordinaunce was made in a Parlement, by him called, wherein he made the Reaumes of* Englond *and* Fraunce, *amongs others,*

to

to be unto him, and to the heirs of his body comyng, and to his iiij *sonnes, and the heires of their bodies commyng, in maner and forme as it appereth in the same act*; And if he myght have obteigned and rejoysed the seid Corones, *&c. by title of Inheritaunce, discent, or succession*, he neither neded, nor wold have desired, or made them to be graunted to him in such wise, as they be by the seid acte, *The which taketh no place, nother is of eny force or effect ayenst him, that is right enheritor of the seid Corones, as it accordeth with Godd's lawe, and all natural lawes; how it be that all other actes and ordinaunces made in the seid Parlement, and sithen been good and sufficant ayenst all other persones.*

Item, Where it is thought, that if the seid *Duc* shuld make any title or cleyme by the line of Sir *Leonell*, he shuld bere the Armes of *Edmund Langley* late *Duc* of *York*: n. 16.

The seid *Duc* answereth, and saith, that trouth is, he myght lawfully have borne the Armes of the seid Sir *Leonell* here bifore, and also the same Armes that King *Edward* the third bare, that is to say, the Armes of the Reaumes of *Englond* and of *Fraunce*, but he absteyned of beryng of the seid Armes, *like as he absteigned for the tyme of purposyng, and pursuing of his right and title*, &c. *for causes not unknowen to all this Reaume; for though right for a time rest, and bee put to scilence, yet it roteth not, ner shall not perish.*

Item, Where it is alleged ayenst the title of the seid *Duc*, that the said *Herry* of *Derby*, at such tyme as he toke uppon him the *Corone* of *Englond*, seid, that he entred and toke the same *Corone* uppon him as right enheritour to King *Herry* the third, and not as a *Conquerour*: n. 17.

The seid *Duc* therto saith, that such saying of the seid King *Herry* the fourth may in noo wise be true, and that the contrarie therof, which is trouth, shall be largely ynough shewed, approved, and justefyed by sufficiaunt auctorite, and matier of record: *And over that, that his seid saying was oonly to shadow, and colour fraudulently his seid unrightwyse, and violent usurpation, and by that moyen to abuse deceyvably the people stonding about him.*

Item, The *Saturday*, the xvij day of this present Parlement, it was shewed unto the Lordes Spirituelx and Temporelx, being in this present Parlement, by the n. 18.

mouth of the ſeid *Chaunceller*, that the ſeid *Duc* of *York*, called beſily, to have haſty and ſpedy aunſwere of ſuch matiers, as touched his title aboveſeid; *And how that for as moche as it is thought by all the Lordes, that the title of the ſeid Duc cannot be defeted; and in eſchewing of the grete inconvenients that may enſue, a meane was found to ſave the King's honour and aſtate, and to appeaſe the ſeid Duc if he wold*, which is this; That the King ſhall keep the Corones, and his aſtate, and dignity roiall, duryng his lyſe, and the ſeid *Duc*, and his heirs, to ſuccede him in the ſame; Exhorting and ſtering all the ſeid Lordes, that if eny of them cowde finde eny other or better meane, that it might be ſhewed; whereuppon after ſad and ripe communication in this matier had, *it was concluded and agreed by all the ſeid Lordes, that ſith it was ſoo, that the title of the ſeid* Duc *of* York *cannot be defeted, and in eſchuing the grete inconvenients that myght enſue, to take the meane above-reherſed, The othes that the ſeid Lordes had made unto the King's Highneſs at* Coventre, *and other places ſaved, and their conſciences therin clered:* And over that it was agreed by the ſeid Lordes, that the ſeid meane ſhuld be opened and declared to the King's Highneſs: And forthwith they went towards the King, where he was in his Chambre, within his Palice of *Weſtminſter*; and in their goyng out of the Parlement-Chambre, the ſeid *Chaunceller* asked of the ſeid Lordes, that ſith it was ſoo, that the ſeid meane ſhuld be opened by his mouth to the King's good Grace, yf they wold abide by him howſoever that the King toke the matier, and all they aunſwered and ſaid, Yee.

All theſe premiſſes thus ſhewed and opened to the King's Highneſs, he, inſpired with the Grace of the Holy Gooſt, and in eſchuying of effuſion of Chriſtien blode, by goode and ſad deliveration, and avyce had with all his Lordes Spirituelx and Temporelx, condeſcended to acord to be made betweene him, and the ſeid *Duc*, and to be auctorized by thauctoryte of this preſent Parlement: The tenour of which accord hereafter enſueth in maner and forme following.

Concordia facta inter Regem & præfatum Ducem. n. 19.

Bleſſed be *Jeſu*, in whos hand and bountie reſtith, and is the peas and unitee betwixt Princes, and the wele of every Reaume; thurgh whos direction agreed it is, appointed, and accorded as followeth; Betwixt the mooſt mighty

mighty Prynce, King *Herry* the sext, King of *Englond*, and of *Fraunce*, and Lorde of *Irelond*, on that oon partie, and the right high, and mighty Prince, *Richard Plantagenet*, *Duc* of *York*, on that other partie, upon certaine matiers of variaunce moeved betwixt them, and in especiall upon the cleyme and title unto the *Corones* of *Englond*, and of *Fraunce*, and roiall power, estate, and dignite apperteigning to the same, and Lordship of *Irelond*, opened, shewed, and declared by the seid *Duc* afore all the Lordes Spirituelx and Temperelx, being in this present Parlement, *The seid agrement, appointment, and accord to be auctorised by the same Parlement.*

First, Where the seid *Richard Duc* of *York* hath declared, and opened as above, his seid title and cleyme in manere as followeth; That the right noble, and worthy Prince, *Herry*, King of *Englond*, the third, had issue, and leefully gate *Edward* his first begoten Sonne, born at *Westminster*, the xv *Kalends* of *Juyll*, in the *Vigill* of St. *Marc* and *Mercellian*, the yere of our Lorde MCCXXXIX. and *Edmund* his secund Sonne, which was borne on St. *Marcell* day, the yere of our Lorde MCCXLV. The which *Edward*, after the deth of the seid King *Herry* his Fader, entitled and called King *Edward* the first, had Issue *Edward* his first begotten Son, entitled and called, after the decesse of the seid first *Edward* his fader, King *Edward* the secund; which had Issue, and leefully gate the right noble, and honourable Prynce, *Edward* the third, the true and undoubted King of *Englond*, and of *Fraunce*, and Lorde of *Irelond*; which *Edward* the third, true and undoubted King of *Englond*, and of *Fraunce*, and Lorde of *Irelond*, had Issue and leefully gate *Edward* his first begoten Sonne, *Prince* of *Wales*, *William Hatfeld* secund begoten, *Leonell* third begoten *Duc* of *Clarence*, *John* of *Gaunt* fourth begoten *Duc* of *Lancaster*, *Edmund Langley* fifth goten *Duc* of *York*, *Thomas Wodestoke* sixt goten *Duc* of *Glouc*, and *William Windsore* the seventh goten; The seid *Edward Prynce* of *Wales*, which dyed in the lyfe of the seid *Edward* King, had Issue and leefully gate *Richard*, the which succeeded the same *Edward* King, his Grauntfire, in roiall dignite, entitled and called King *Richard* the secund, and dyed without Issue. *William Hatfeld*, the secund goten Sonne of the seid *Edward* King, dyed without Issue. *Leonell*, the third goten

This is the same verbatim *with the Writing put into the Parlement*, n. 11.

Sonne

Sonne of the ſame *Edward* King, *Duc* of *Clarence*, had Iſſue, and leefully gate *Phelippe* his only daughter and heir, which by the Sacrament of Matrimonie copled unto *Edmund Mortymer Erle* of *Marche*, had Iſſue, and leefully bore *Roger Mortymer Erle* of *Marche*, his ſonne and heire; which *Roger Erle* of *Marche* had Iſſue, and leefully gate *Edmund Erle* of *Marche*, *Roger Mortymer*, *Anne*, and *Alianore*; which *Edmund*, *Roger*, and *Alianore*, dyed without Iſſue; and the ſeid *Anne* under the Sacrament of Matrimonie copled unto *Richard Erle* of *Cambrigge*, the ſonne of the ſeid *Edmund Langley*, the fift goten ſonne of the ſeid King *Edward*, as it is afore ſpecified, had Iſſue, and leefully bare *Richard Plantagenet*, commonly called *Duc* of *York*: The ſeid *John* of *Gaunt*, the fourth goten ſonne of the ſeid King *Edward*, and the younger Brother of the ſeid *Leonell*, had Iſſue, and leefully gate *Henry Erle* of *Derby*, which incontinent, after the time that the ſeid King *Richard* reſigned the *Corones* of the ſeid Reaumes, and the ſeid Lordſhip of *Irelond*, *unrightwiſely entred upon the ſame*, *then beying on lyve* Edmund Mortymer Erle *of* Marche, *ſonne to* Roger Mortymer Erle *of* Marche, *ſonne and heir of the ſeid* Phelippe, *daughter and heir of the ſeid Sir* Leonell, *the third ſonne of the ſeid King* Edward *the third*; *to the which* Edmund *the right and title of the ſeid Corones and Lordſhip by lawe and cuſtome belonged.*

To the which *Richard Duc* of *York*, as ſonne to *Anne*, daughter to *Roger Mortymer Erle* of *Marche*, ſonne and heir to the ſeid *Phelippe*, daughter and heir to the ſeid *Leonell*, the third goten ſonne of the ſeid King *Edward* the third, the right, title, dignite roiall, and eſtate of the *Corones* of the Reaumes of *Englond*, and of *Fraunce*, and of the Lordſhip and Lond of *Irelond*, *of right*, *lawe*, *and cuſtume apperteigneth*, *and belongeth*, *afore eny iſſue of the ſeid* John *of* Gaunt, *the fourth goten ſonne of the ſeid King* Edward.

n. 20. The ſeid title natheleſs notwithſtanding, and without prejudice of the ſame, The ſeid *Richard Duc* of *York*, *tenderly deſireyng the wele*, *reſt*, *and proſperite of this lond*, *and to ſet apart all that*, *that myght be trouble to the ſame*, *and conſidering the Poſſeſſion of the ſeid King* Herry *the ſixt*, *and that he hath for his time be named*, *taken*, *and reputed King of* Englond, *and of* Fraunce, *and Lorde of* Irelond; *is content*,

content, agreeth, and consenteth, that he be had, reputed, and taken, King of *Englond*, and of *Fraunce*, with the roiall estate, dignite, and pre-eminence belonging therto, and Lord of *Irelond*, duryng his lyfe naturall; and for that time the seid *Duc*, without hurt or prejudice of his seid right and title, shall take, worship, and honour him for his Soveraine Lorde.

Item, It is accorded, appointed, and agreed, that the seid *Richard Duc* of *York* rejoyse, be entitled, called, and reputed, from hens forth verrey and rightfull heire to the *Corones*, roiall estate, dignite, and Lordship aboveseid; and after the decesse of the seid King *Herry*, or when he woll ley from him the seid *Corones*, estate, dignite, and Lordship, the seid *Duc*, and his heires, shall immediately succeed to the seid *Corones*, roiall estate, dignite, and Lordship. n. 22.

Item, For the more establishing the seid accord; It is appointed, and consented, that the Lordes Spirituelx and Temporelx, being in this present Parlement, shall make oothes to accepte, take, wurship, and repute the seid *Richard Duc* of *York*, and his seid heires, as above is reherced; and kepe, observe, and strengthen, in as much as apperteigneth unto them, all the things aboveseid, and resist to their power all them that wull presume the contrary, according to their estates and degrees. n. 25.

The King understanding certainly the seid title of the seid *Richard Duc* of *York* just, lawful, true, and sufficant; by thavis and assent of the Lordes Spirituelx and Temporelx, and Commens in this present Parlement assembled, and by auctorite of the same Parlement, declareth, approveth, and ratifieth, confermeth, and accepteth the seid title just, good, lawfull, and true, and therunto yeveth his assent, and agreement, of his free will and libertie. And over that, by the seid avis and auctorite, declareth, entitleth, calleth, stablisheth, affermeth, and reputeth the seid *Richard Duc* of *York* verrey, true, and rightfull heire to the *Corones*, roiall estate, and dignite of the Reaumes of *Englond*, and of *Fraunce*, and of the Lordship of *Irelond* aforeseid; and that according to the wurship and reverence, that therto belongeth, he be taken, accepted, and reputed, in wurship and reverence, by all the States of the seid Reaume of *Englond*, and of all his Subgetts thereof, saving and ordeigning by n. 27.

the ſame auctorite, the King to have the ſeid *Corones*, Reaumes, roiall eſtate, dignite, and pre-eminence of the ſame, and the ſeid Lordſhip of *Ireland*, duryng his lyfe naturall. And ferthermore, by the ſame avis and auctorite, wolle, conſenteth, and agreeth, that after his deceſſe, or when it ſhall pleaſe his Highneſs to ley from him the ſeid *Corones*, eſtate, dignite, and Lordſhip, or therof ceſſeth; The ſeid *Richard Duc* of *York*, and his heires, ſhall ymmediately ſucceed him in the ſeid *Corones*, roiall eſtate, dignite, and Lordſhip, and them then have and joy, *any Act of Parlement*, *Statute*, *Ordynaunce*, or other thing, to the *contrarie made*, *or interruption*, *or dyſcontinuance of poſſeſſion notwithſtonding*. And moreover, by the ſeid avis and auctorite, ſtabliſheth, graunteth, confermeth, approveth, ratifieth, and accepteth the ſeid accord, and all things therin conteyned; And thereunto freely and abſolutely aſſenteth, and agreeth.

From this Record it is evident,

1. *Richard* Duke of *York* exhibited his bare Claim and Title to the Lords *only*.

2. *Richard* Duke of *York* did not *petition* the Lords, *n.* 11.

3. His Counſel only delivered in a Writing, containing his Deſcent and Title by *Birthright*, and *Hereditary Succeſſion*, and nothing elſe.

4. The Matter was ſo high, the Lords could not anſwer it, nor enter into Communication thereof, without the King's Command, Agreement, and Aſſent.

5. The King conſented, and prayed and commanded the Lords to ſearch and find out what might be oppoſed to the Duke's Claim and Title.

6. They ſent for the Judges, to adviſe what might be ſaid againſt the Duke, to fortify the King's Right.

7. The Judges excuſed themſelves, for that the Matter was ſo high, and touched the King's high Eſtate, and Regality, *which was above the Law*, and paſſed their Learning; wherefore they dare not enter into Communication thereof.

8. The Lords, upon this Anſwer of the Judges, ſent for the King's Serjeants and Attorney, and gave them the ſame Command; who made the ſame Excuſe the Judges had done; but the Lords would not take it:

Where-

Whereupon the Articles and Reasons against the Duke's Claim and Title were exhibited, *n.* 13.

9. That in the Articles and Reasons against the Duke's Claim and Title, there is not the least Word of *Philippa*'s being illegitimate, or that her Father was divorc'd from her Mother; nor is there the least mention, that the House of *Lancaster* claimed by Prescription of sixty Years Possession, (which comes from *Doleman*) and the Author is to find out both these Things in the Parliament Rolls, or be guilty of downright Falshood; for he reports them both, as pleaded against the Duke's Title. As to the first, there needed no other Argument, if it had been insisted on, and could have been made good. And as to the second, neither was it insisted on, or mention'd, as was said before; and if it had, *Nullum tempus occurrit Regi*, would have been a sure Rule in this Case: For it is absurd to think, that Prescription, at least so short a Prescription as this, could justify a Wrong, and make a Title in this Case; for there is another Rule of Law, *Non confirmatur Tractu temporis, quod de jure not subsistit*; no Length of Time makes that lawful, which was not so from the Beginning. If there be a Right Heir of the Crown, that claims, or else would claim, but that he wants either Notice of his Right and Title, or Power to make it good, or forbears to claim for other sufficient Reasons; here Prescription signifies nothing. *The Author*, p. 22, 23. Vide n. 16.

10. It was allowed, at least not contradicted, that *all Persons*, and namely the *Peers* and *Lords*, might, and by the Laws of God and Man ought *to help and assist him in Truth and Justice*, n. 14.

11. It was the Judgment of all the Lords, that the Title of the Duke, which was only Succession by Birthright, and *Proximity of Blood*, could not be defeated.

12. That *Richard* Duke of *York* was by King *Henry*, and the Lords, acknowledged as very and rightful Heir to the Crown, and that he was so to be called.

13. That the Mean found out to save the King's Honour, and appease the Duke, *if he would*, was not, nor could be imposed or forced upon him; but he was at Liberty to accept or refuse it, and was no ways bound, but by his own Consent, *n.* 18.

14. The Oath that *Richard* Duke of *York* took, was in *Pursuance* of the Agreement; and any Man may lawfully take

take an Oath to make good a Bargain, where no Man receives Injury but himself; and so with his Consent that is injured, any other Person concerned in the Agreement, may swear to the Observation of it.

Pag. 24. Lastly, The *Weal*, *Rest*, and *Prosperity* of the *Land*, (which the Author calls the *Publick Good)* followed this Agreement; and the Reason was, that the Crown was restored to the Right Heir; whereupon all Murmuring, Hatred, Strife, and Contention amongst the People, and Evil-will and Contrivances against one another, ceased.

Ad p. 105.

Numb. III.

Fol. 165. Registri Stillington B. & Wells Episcopi, 1490. Certificatio Mandati Domini Archiepiscopi Cant. pro declaratione & confirm. Tituli & Matrimonij Domini nostri Regis.

OUR H. Fadre the Pope *Innocent* VIII, *&c.* by his proper Motion without Procurement of our Sovereign Lord the King, or of any other Person, for Conservation of the Universal Peace, and eschewing of Slanders, as should gendre the contrary of the same; understanding of the long and grievous Varyances, Dissensions, and Debates, that hath been in this Realm of *England*, bytween the House of the Dutchy of *Lancastre* of that one Part, and the House of the Dutchy of *York* on that other Part: Willing all such Divisions in Time following to put apart: By the Counsell and Consent of his College of Cardinals, approveth, confirmeth, and stablysheth the Matrimony and Conjunction made bytween our Sovereign Lord King *Henry* VII. of the House of *Lancastre* of that one Part, and the Noble Princesse *Elizabeth* of the House of *York* of that other Part, with all the Issue lawfully born bytween the same. And in lykewise his Holinesse confirmeth, stablysheth, and approveth the Right and Title of the Crown of *England* of the said our Sovereign Lord *Henry* VII. and the Heirs of his Body lawfully begotten to him and them perteyning, as well by reason of his nigheſt and undoubted Title of Succession, as by the Right of his most Noble Victory, and by Election of the Lords Spirituall and Temporall,

rall, and other Noblys of this Realme, and by the Act, Ordonnance, and Authority of Parliament made by three States of the Lond. Furthermore he approveth, confirmeth, and declareth, that if it pleased God, that the said *Elizabeth*, the which God forbid, should decease without Issue, bytween our Sovereign Lord and Her of their Bodies born; that then such Issue as bytween him and her, whom after that God shall joyn him to, shall be had and born right Inheritours to the same Crown and Realme of *England*. Over this, the same our H. Fadre gevith his Blessing to all Princes, Noblys, and other Inhabitants of this Realme or outward, that aydeth and asserteth the said our Sovereign Lord and his Heirs agenst his or ther Rebells, geving to them, that dye in his and ther Quarrell, full and plenary Pardon and Remission of their Sinnes.

NUMB. IV.

Ad *p.* 161.

In Lord Chief Justice *Coke*'s 4th *Inst. c.* 1. of the High Court of Parliament is the following Act.

REX, &c. Charissimis Consanguineis nostris nobilibus viris Joanni Militi, Henrico Clerico, Thomæ Domicello, ac dilectæ nobis nobili mulieri Joannæ Beaufort Domicellæ germanis præcharissimi avunculi nostri Joannis Ducis Lancastriæ natis Ligeis nostris salutem, &c. Nos dicti Avunculi nostri Genitoris vestri precibus inclinati, vobiscum qui (ut asseritur) defectu natalium patimini, ut hujusmodi defectu (quem ejusque qualitatis quæcunque præsentibus habere volumus pro sufficientèr expressis) non obstante, ad quascunque honoris dignitates (exceptâ dignitate Regali) *præheminentias, status, gradus, & officia publica & privata, tam perpetua quàm temporalia, atque feudal. ac Nobil. quibuscunque nominibus nuncupantur, etiamsi Ducatus, Principat', Comitat', Baronia, vel alia feuda fuerint, etiamsi mediatè, vel immediatè, vel à nobis dependeant seu teneantur, præfici, promoveri, eligi, assumi, & admitti, illaque recipere, retinere perinde liberè & licitè valeatis, ac si de legitimo thoro nati existeretis, quibuscunque statutis seu consuetudinibus Regni nostri Angliæ in contrarium editis seu observatis (quæ hic habemus pro talitèr expressis) nequaquam obstantibus; de plenitudine nostræ Regalis Potestatis, ac de assensu Parliamenti nostri tenore præsentium dispensamus, vosque & vestrum quemlibet Natalibus restituimus & legitimamus.*

mamus. In cujus rei testimonium. Teste Rege apud Westm. 9 die Feb. per ipsum Regem in Parliamento.

Ad p. 173.

NUMB. V.

A Letter from Q. Jane's *Privy Council to the Sheriff,* &c. *of* Kent.

AFTER our hearty Commendations, *&c.* Whereas the Queen's Highnesse, Queen *Jane*, being presently by just Title *in full Possession* of the Imperiall Crown of this Realme, and other Dominions, and Preeminencies thereunto belonging; and the Lady *Mary*, Bastard-Daughter of the late King of famous Memory, King *Henry* VIII, doth not only by all the Waies and Means she may, styrre and provoke the Common People of this Realme to Rebellion, but also seeketh Means to bring in great Force of *Papists*, *Spanyards*, and other Strangers, for the Aid of her unjust and unnaturall Pretence, to the great Perill and Danger of the utter Subversion of God's Holy Word, and of the whole State of this Realme: Albeit wee nothing doubte, but these seditious and rebellious Doeings of the said Lady *Mary*, being well known unto you, will of themselves admonish you of your Duties to your, and our said Sovereigne Lady Queen *Jane*, and the Preservation of the true Religion, and antient Liberty of your naturall Country against Forreign Powers; yet considering, what Desolation may come to Men of Worship, and good Degree, and Wealth, by the Rebellion of the baser sort; we have thought good to signify unto you, that our said Sovereign Lady Queen *Jane*'s Pleasure and Commandment is, that you shall not only use all manner of Travel and Labour to keep and preserve her Majesty's People, inhabiting nigh about you, in Peace and good Quiet, and to represse all others, that shall goe about to move any Tumult, either by the Pretence of the unjust and fayned Title of the Lady *Mary*, being Illegitimate and Bastard, as is aforesaid, or by any other means; but also to put yourselves in order, with such Numbers of Horsemen and Footmen, as you shall be able to make of your Servants and Tenants, and others under your Rules and Offices; so as you may upon sending for, or other knowledge given you, either repayre to our very good Lord, the Duke of *Northumberland*, who having with him a very good Lord the Marquis

quis of *Northampton*, the Erle of *Huntington*, and other Personages of Estate, is presently in the Field with our said Sovereign's Power, for the Repression of the said Rebellyons: Or otherwise be employed for the Defence of the Realme, as the Case shall require. By your good Travell herein, you shall not only declare yourselves good and faythfull Ministers to the Queen's Highnesse and your Countrey, but also well deserve to find her Highnesse your good and gracious Lady, in any your reasonable Suits, and us also most ready to further your said Suits accordingly. Thus fare ye right heartily well.

From the Towre att *London* the 12th day of *Julye*, 1553.

Your assured Loving Frynds,

T. Cant. T. Ely Canc. Wynchester, Bedford, Suffulke, Arundel, Shrewsbury, Pembroke, Ryche, W. Petre, W. Cecyll, J. Cheek.

To our Loving Frynds the Sheriffe of Kent, *the Justices of Peace of the same Shire, and to every of them.*

NUMB. VI.

Ad *p.* 186.

Journal of the House of Lords, *ann. ult. Hen.* 8^{vi}.

Memorand. QUOD *die Lunæ, viz. ultimo die Jan. Anno Regni Regis Hen.* 8^{vi} 38vo *Dominus Cancellarius, considentibus universis magnatibus, convocatis etiam Militibus, & Burgensibus à Domo communi, plenâ, viz. Curiâ, declaravit mortem Domini nostri Regis Hen.* 8^{vi}, *qui obiit die Veneris ultimo præterito, cujus animæ propitietur Deus. Quæ res dici non potest quàm erat luctuosa omnibus, & tristis auditu; Cancellarius verò ipse vix potuit præ lachrymis effari: tandem verò sedato fletu, & refectis animis omnium recordatione Principis Edwardi Divinâ indole imbuti, tum etiam lectione benè magnæ partis Testamenti dicti Domini nostri Regis defuncti, id quod factum est publicè per Wm Paget militem, Primarium Secretarium dicti Domini Regis, sc. de successione in Regno, de gubernandâ Repub. durante minore ætate jam dicti Domini Principis Edwardi, de solvendis debitis, de præstandis promissis, &c. D. Cancellarius declaravit, per mortem dicti Domini Regis dissolutum esse hoc Parliamentum, &c.*

NUMB.

Ad p. 296.

NUMB. VII.

A Declaration of the Succeſſion of the Crowne Imperiall of Ingland, *made by* J. Hales, 1563.

IN ſo great and waighty a Matter as we have in hand, which concerneth the whole Realme univerſally, and every one of us particularly, I thinke I ſhall not neede to uſe any longe proheme to purchaſe your Favors to be content, or to move yow to be attentive to marke what ſhall be ſayd. For as we few choſen of an infinite Multitude to treat and do theſe things, that ſhall be for the Benefit of the Commonweale, and be put in Truſt for the Body of the Realme: So I truſt Nature hath engrafted in us a deſire to ſeeke thoſe things, which may doe us good, and to avoyd the contrary: Wherefore not mindinge to uſe more Words then needs, nor fewer then me thinke the Greatnes of the Cauſe to require, I will directly proceed to the Matter.

The great and horrible Murders, and bloody Battayles, that were betweene the Factions of the Red Roſe and the White, the Howſe of *Yorke* and *Lancaſter*, for the Crowne of this Realme, by the happy Mariage of Kinge *H.* the vijth, and Queene *Elizabeth* his Wife, were ended; whereby great Quietnes and Peace (thanks be unto God) hath followed in this Realme, God graunt it may ſo continew.

This Kinge *H.* the vij and Queene *Elizabeth* had Iſſue, as yow know, Kinge *H.* the viijth, the Lady *Margaret*, and the Lady *Mary*. Kinge *H.* the viijth had Iſſue Kinge *Edward* the vjth, Queene *Mary*, and Queene *Elizabeth*, the Queene's Majeſty that now is.

The Lady *Margaret* was firſt maryed to *James* K. of the *Scotts*, who had Iſſue *James* Kinge of *Scotts*, Father to *Mary* now Queene of *Scotts*. After his Death ſhe maryed with the Erle of *Angwiſh*, and had Iſſue by him the Lady *Margaret*, now Counteſſe of *Lennox*.

The Lady *Mary*, the other Daughter of Kinge *Henery* the vijth, was firſt maryed to *Lewis* the *French* Kinge, and had no Iſſue of him. After ſhe was maryed to *Charles* Duke of *Suffolke*, firſt ſecretly in *Fraunce*, and after-

afterward openly in *England*. The Duke and She had Iſſue the Lady *Frauncis*, and the Lady *Elianor*.

The Lady *Frauncis* beinge eldeſt, was maryed to the Marques *Dorcet*, by whom ſhe had Iſſue the Lady *Catherine*, and the Lady *Mary*.

The Lady *Elianor* was maryed to the Erle of *Comberland*, and had Iſſue the Lady *Margaret*, now Wife to the L. *Straunge*.

By the Statutes of Kinge *Henery* the viij, 28 and 35. the Crowne was intayled (as you know) for lacke of Iſſue of Kinge *Edward* to Q. *Mary*, and to the Q. Majeſty that now is; and for lacke of Iſſue of their two Bodyes, to ſuch Perſon and Perſons in remaynder, as ſhold pleaſe Kinge *Henery* the viij, and accordinge to ſuch Eſtate, and after ſuch Manner, Forme, Facion and Condition, as ſhold be expreſſed, declared, named, and lymited in his Highnes Letter Patents, or by his laſt Will in Writinge, ſigned with his Grace's hand. Stat. 28 H. 8. & 35 H.8.

For the Eſtabliſhment of which Succeſſion we the Subjects of this Realme, beſides our Promiſe by that Act declar'd, were alſo ſworne by Othe, that we ſhold be obedient to ſuch as Kinge *H*, accordinge to the ſayd Eſtatutes, ſhold appoynt to ſuccede the Crowne, and not to any other within this Realme, nor to any forreyne Aucthority, Power, or Potentate; which Words do print well in your Myndes (I beſeech yow.) Whereupon the ſayd Kinge *H.* made his Will accordingly, in which he put the Heyres of the Lady *Frauncis* firſt, and next the Lady *Elianor* in remaynder.

Others ſay, he cauſed a Will to be made, which was not accordinge to the Statute; for that it was not ſigned with his Hand. Some ſay he made no Will at all.

The Queſtion groweth, whether the Heyres of the *Scottiſh* Queene, or the Heyres of the Lady *Frauncis* and *Elianor* be next Inheritors to the Crowne; if it ſhold pleaſe God to take from us the Queene's Majeſty without Heyres of her Body, or whether any of them be inheritable; whereunto I declare my Minde and Judgement.

Firſt, The Legacyes and Bequeſts, that Kinge *H.* made to diverſe both of Lands and Monny, declare that he made a Will; for all were performed and ſatisfyed, I am enformed.

Alſo after his Deceaſe, diverſe Indentures tripartite were made betweene King *Edward* and the Executors of Kinge *H.* his Will, and others; and diverſe Purchaſes and Patents paſſed under the Great Seale of *Ingland*, in conſideration of the Accompliſhment and Performance of Kinge *H.* his Will.

Thirdly, Ther was a Will in the Name of K. *Henery* enrolled in the *Chauncery*, and diverſe Conſtats therof made under the Great Seale, in which Will the Remaynder of the Crowne was in the Heyres of the Lady *Frauncis* firſt, and afterwards in the L. *Elianor.*

Finally, Ther was a Clauſe in the ſame Will, that all other Wills made at any other Time, were Voyd and of none Effect; which needed not, if there had been none other Will; and that ſigned with his Hand.

All which be evident Arguments, that Kinge *H.* dyed not Inteſtat, but that he made a Will; and that it was the ſame Will, that was enrolled in the *Chauncery*; for it is not to be thought, that ſuch Enrollement was done in vayne.

If the Will were made accordinge to the Statute; then it is without all doubt, that as we be bound, and have taken them for Kings and Queens by Name, that be expreſſed in the ſayd Statuts, ſo we be bound to accept them, that be declared by the Will in Remaynder or Revercion; That is, the Heyres of the Lady *Frauncis*, and the Lady *Elianor*; for they be expreſſed in the Will, and ought to have it by the like Auꞓthoritye and Title, as other expreſſed in the Statute; bycauſe it was in like manner done with the Conſent of the whole Realme confirmed by Othes, which being not contrary to God's Lawes, nor the Law of Nature, and beinge in our Powers to obſerve and keepe, we ought not in any wiſe to alter or breake; for we know the Judgments of the Lord is certayne, *That he will not hold him guiltles that taketh his Name in vayne:* And ſo the Act and Will is a Barre and Excluſion to all others, be they never ſo near of Bloud, if any there be.

But ſome ſay, it is no Will made accordinge to the Statute; bycauſe it is not ſigned with the King's Hand, ſay they.

I pray yow conſider well the Matter: If it ſhold now be doubted, whether it was his Hand; and that none

none shold be interpreted his Hand, but that was written with his owne Fingers; you shold admitt some of the Parlayments made by Kinge *H.* the Eyght; for the Statute made A° xxxiij° of Kinge *H.* viijth, *ca.* xj°, saythe, that the King's Royal Assent with his Letters Patents under his Great Seal, and signed with his Hand, and declared in the higher House to the Lords and Commons, is of such Force, as if he were present; accordinge to which Act diverse Assents at Parlayments were made, and in some of them some were attaynted of Treason, and suffered. Now if we shold doubt, whether it were his Hand or not, we mought perchaunce bringe such things in doubt, as we would not gladly come in doubt of; for we should put whole Parlayments in doubt. Stat. 33 H. 8. cap. 11°.

But it may be sayd, sith by these Statutes that Power was given to King *H.* that he might make his Will of the Crowne, which otherwise by Law he cold not doe; Reason it is, he follow the Law prescribed; if he hath not done it, then it is voyd in Law; bycause *forma dat esse rei.*

To this I aunswer, that albeit it was not signed with his Hand, yet is it not a sufficient Cause, that we shold reject it; for if the Forme be so necessary to be observed; why, I beseech yow, do you allow Queene *Marye*'s Parlayments, that were called by Writts, without the Addition of the Stile and Title of the Supreeme Head of the Church of *England*, &c. when there was a speciall Statute, and of the greatest Importaunce, before made of purpose to declare, that the Bishop of *Rome* had no Auctthority within this Realme; and chiefly upon this Cause, for that Kinge *H.* seinge his Daughter *Marye*'s Stubbornes and Malice to his Doings, and fond Devotion to the Pope, ment, that if she shold at any Time come to the Place, she shold not, if she wold, undoe that he had done. And if yow will say, these Words of Supremacy needs not, albeit there were such a Statute; much lesse say I, these Words (with his Hand) need in this Case: For if you mark well the Consideration, why this Auctthority was given to Kinge *Henery* the viijth, for the Establishment of the Succession; yow shall find, it was to no other Ende, then the Statute of Kinge *H.* viijth in xxviij° declareth; that is, that Stat. 28 H. 8.

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after his Life the Realme ſhold not be deſtitute of a lawfull Governour, which ye ſee in this Will in this Part is fully performed; for by his Will he hath put firſt in Remaynder theyres of the Lady *Frauncis*, and then the Lady *Elianor*; which beinge next of his Blood and Kinne, and ſuch as he loved, and had no cauſe to hate, Nature did move, and Reaſon did teach, to preferre above all other.

Theyres of the *Scottiſh* Queene (ye know) he had no cauſe to love; for Kinge *James*, when he had promiſed to meete him at *Yorke*, mocked him; and afterwards made Warre agaynſt him. And when the Lords of *Scotland* (after Kinge *James* his Death) had promiſed him the Mariadge of their Queene, they deceyved him, and maryed her to the Erle of *Angwiſhe*; which was not only without his Conſent, but alſo unorderly and unlawfully done (as it is ſayd.) And for the Words in the Statute (*the Will to be ſigned with his Hand*) is not of neceſſity; for that it was ment for the Succeſſion; for he might have appoynted a Succeſſor certayne without his Hand-Writinge; but for the more ſuerty, there ſhold be no counterfeyted Will in his Name, which cannot be preſuppoſed of this Will, when theſe be named in Remaynder, which of Nature and Right ought to be præferred therunto. Shall we then with cavelinge Words ſubvert the State, when by the true Meaninge of the Statute, and without Injury to any, we may preſerve our Country in Safety? Surely in my Judgement ther is no Reaſon, Equity, or Conſcience, that can lead us ſo to doe: But, ſay they, it is not his Will ſigned with his Hand as the Statute requireth. How prove they that? Eyther it muſt be diſproved by a ſufficient Number of Witneſſes, ſuch as I take, bothe the Law Civill and Canon doth allow; for by what Law it was made, by that Law it muſt needs be diſproved: Or elſe by comparinge the Hand and Signe, the Particle is ſigned, with other Writings that were ſigned with his own Hand; But ſuch Conferrence cannot be, bycauſe the Original cannot be found: And to ſay the very truethe, after the Will was once proved and allowed, (which I take to be ſufficiently done) when it was enrolled in the *Chauncery*, and publiſhed under the Great Seale of *Ingland*, by Kinge *Edward* the vith, being the Supreme Head in

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Earth of the Church of *Ingland*, and ſo a ſufficient Ordinary, the Particle needed not; for the Record was of more Strenght.

But, ſay they, there can be no ſuch Record found in the Chauncery. Whether there be any ſuch Record remayninge therof, or not, I know not; but ſure I am, there was a Record thereof, and diverſe Conſtats made of it under the Great Seale of *Ingland*, for every of the Executors, and alſo for ſome others.

But I pray yow tell me, is it Reaſon, bycauſe the Originall, nor any Record therof appearethe, the Right of thoſe that be in Remaynder ſhold be loſt? Do Men looſe their Inheritaunce, if by Chaunce of Fire or otherwiſe their Evidence be loſt? And did Sir *Richard Sackvill*, Sir *John Maſon*, Sir *Henery Nevell*, or theyres of Sir *Phillip Hobby*, loſe the Right to the Biſhop of *Wincheſter*'s Lands, bycauſe the Record thereof was deſtroyed? I trow yow will deny it; bycauſe the laſt Parlayment yow did orderly reſtore them. And albeit there be no Record of K. *Henery* his Will; yet there is no doubt, but ſome of the Conſtats doe remayne, and alſo Coppyes therof: And the Memory therof is ſo freſh, that albeit all the Conſtats and Coppyes were deſtroyed, yet there be Men, that do remember, that there was ſuch a Will, and that the Remaynder was declared to be in the Heyres of the Lady *Frauncis*, and the Lady *Elianor*.

But let us conſider (I beſeech yow) at what Time, and to what Purpoſe, and End, the Record of the Will was defaced and deſtroyed: It was done in Queene *Marye*'s Time (as the common Report goeth) and it muſt needs be preſumed, that ſuch wiſe and learned Men, as then bare the Sway of the Realme, wold not doe it for nought.

Was it bycauſe Queene *Mary* wold not ſatisfy the Bequeſts and Legacyes therein mencioned? That cannot be; for all were largely payd and performed before her Time to the uttermoſt. Was it then bycauſe they wold not have the Maſſes and Obytes therin expreſſed continued? That cannot be thought, when ſhe and thoſe that did it, did put their chief Truſt of Salvation in Maſſes and Obytes.

Was it bycauſe they tendered Kinge *H.* his Honour, that they wold not have it appeare, that his Will after

his Death, and his Doings in his Life-time, were contrary? How cold that be, when they labored by all the Wayes they cold, to undoe that which he had done; to deface and dishonor him in all Things; and as some thinke, burnt also his Bones?

Was it bycause there was any thinge in the Will, which might authorize the Executors to withstand in any thinge Queene *Marye*'s Affections? None were so plyable to her Devotions as the Executors, and they that were named in the Will: Was it bycause they wold barre the Queene's Majesty that now is of the Crowne? That cold not be; for she claymethe it, not by Will, but by Statute.

Seinge then that none of these Causes, that I have told, served to maintayne their Doinges, for the Destruction of this Will; and that both the Originall, and the Record of the Will be destroyed; it must of Necessity be concluded, that it was done onely, for that they knew the Will to be lawfull, and saw no other way to deprive the Heyres of the Lady *Frauncis* of their Right to the Crowne; otherwise they had no Cause to conceale it; which Imagination of them, esteeminge themselves so wise and so learned, shall be deadly.

Consideringe that *Will. Sommer* used not in his Madness to doe any thinge, but he wold render a Reason or Color for it, wrong or right: And some so ernestly labored agaynst the Law and theyr Othes to dissolve the Act of Succession, that if they had knowen any Man, that cold justly have preferred their Purpose, and sayd, it was a Counterfayt Will, they wold have made him to doe it by Hooke or Crooke, eyther for Hope of Reward, or for Feare of Torture.

Wold not they (thinke yow) have done it by some Color of Law, or by Examination of Witnesses? Shold it not have beene published in the Starre-Chamber, preached at *Poule*'s Crosse, declared by Act of Parlayment, and proclaymed in every Quarter of the Realme? Yes, doubtless: Nothinge shold have been omitted, that cold possibly have beene devised, whereby so manifest an Untruthe, so muche of their Commoditye, might appear; but bycause they saw, they cold not do it justly, nor handle the matter so craftily, but that every Man wold perceyve theyr Doinges, and in some disclose

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theyr Juglins; therefore by like, like politicke Men, they tooke an unorderly Meane, and destroyed the whole Record; thinkinge therby no Witnes cold be found, and so no Truthe appeare: But is not this, trow yow, a very straunge thinge?

What if it be sayd otherwise; either it must be his Will signed with his Hand, or els it is no Will at all. It will be as easy to prove the one, as deny the other; for it cannot be but a Will; for there be xi Witnesses, Men very honest and substanciall, that with the Subscription of their Names do testify the same; and upon that the Executors proved the Will, tooke upon them the Administration, and have in every Point fulfilled it. Surely it cannot be denyed, but that the Witnesses were very honest Men, substanciall and worthy to be credyted.

But the selfe same Witnesses that say it was a Will, affirme in like manner, that it was signed with his owne Hand: For the Words of the Will be these; *In Witness whereof we have signed it with our owne Hand, in our Pallayce at* Westminster, *the third Day of* December, &c. *beinge present and called to be Witnesses these Persons, that have written their Names hereunder*, Jon. Gats, *&c.* So as I can learne no Remedy, but eyther bothe must be graunted, or bothe denyed; that is, eyther it is no Will, or els it was signed with his owne Hand.

Agaynst any of these Testimonyes can none of these Witnesses come, except they will discredit themselves; and if any of the Executors goe about to impugne this Foundation and Testimony of the Witnesses; then shall he not onely destroy his chiefe Buildinge; but also say now agaynst that he hath before most manifestly confessed, when he allowed it, and proved it to be enrolled, and put forthe under the Great Seale; and so with his Doublenes shall make himselfe no meete Witnes.

Besids these two Kinds of Witnesses I cannot imagyne any; for some of the Executors, and those xi Witnesses were suche, as were continually waytinge on the King's Person. If any other will come forth, and say it was not his Hand, it is to be considered, how many, and what they be; not one or two will serve the Purpose, but there must be many, and those *omni exceptione majores*. Yf they were privy or consentinge to thembezellinge of the Particle, or Destruction of the Record, the Law will not

not admitt them for Witnesses; for it accountethe them *inter falsarios*, and so *infames*. But sith in this Will, which is called Kinge *H.* his Will, there is this Clause, *That all other Wills, made at any other time, shold be voyd*; it appearethe he had other Wills. If any Man will deny it, not onely the Words of the Will (which otherwise shold be in vayne) will playnely reprove him; but also there be yet livinge, that have seene the same, and how that some of them were interlyned by Kinge *H.* and some of them in all, or for the most part, written with his owne Hand.

But perhaps it will be doubted, whether there were any suche Succession limyted or set forthe in his Will; which methinks ought not; for it will appere by manifest Presumption. First it is not to be doubted, sith Kinge *H.* so long time before (like a prudent Prince) forsaw the great Daunger, that the Realme might fall in, for the Uncertaynty of the Succession; and that he had procured Auctthority and Power by Parlayment to establish it; and that mindinge in his Dayes personally to invade *Fraunce*; but that like a Father of his Country, with good Advisement and Deliberation he made his Will, and established the Succession.

Secondly, It must needs be, that in that Will, so made before his goinge over, the Limitation of Succession was in such Manner and Forme, as is declared in his last Will: For, as I sayd before, there was no Cause, that he shold beare any Affection to the *Scottishe* Queene, nor yet to the Lady *Lennox*; and havinge no Cause to be offended with his Sister the *French* Queene, nor her Children; that is to be judged, that he wold not leave it to any other before them, or not provide, it might come to them specially, when he had none other Kinsfolke of his owne Blood to leave it unto.

Thirdly, This Last Will can be no new Will devised and made in his Sicknes, but the Coppy of his former Will; for if it had bene a new Will, then devised, who cold thinke, that eyther himselfe wold, or that any durst to have moved him to have put therin so many things contrary to his Honor? And sith it seemethe to be before written of his owne Devise, and no Man durst move him to alter it in those Poynts, that were agaynst his Honor, muche lesse durst they themselves devise any new Suc-

Succeſſion, or move him to alter it otherwiſe, then they found it, where they ſaw, it cold be none otherwiſe naturally diſpoſed; And therefore if it cold be fully proved, that his Will, which was called Kinge *H.* his Will, was not ſigned with his owne Hand (as it will be a very hard matter to prove *negativum Factum*) yet can it not be denyed, but ſome of thother Wills, out of the which this Will was copyed, was written and ſigned with his owne Hand, or at the leaſt enterlyned, which may be ſayd a ſufficient Signinge with his owne Hand; albeit perhaps the very Originall can not be brought forthe.

Sith then it appeareth, that Kinge *H.* made a Will; ſith it appearethe by the Teſtimony and Subſcription of the xj Witneſſes, that it was ſigned with his owne Hand; ſith it was ſo præferred by the Executors; ſith it was as his Will enrolled in the *Chauncery*, and publiſhed under the Great Seale of *Ingland*, wherein it was written, that it was ſigned with his owne Hand; ſith the Particle, and the Record therof be without Order deſtroyed, and all the other Wills burnt; and ſith there can come forth no ſuche Witneſs to diſprove it, as the Law admitteth; methinketh there is no Reaſon nor Color to move us to thinke, that this was not Kinge *H.* his Will, made accordinge to the Statute; nor yet that Men ſhold thinke, that he made no Will; but rather to pronounce and confeſſe, that he made a Will accordinge to the Statute; and that which was called his Will, is the very true and right Will; and that by the Statutes, and by our Othes we are bound to receave them for Kings and Queenes of this Realme, if it ſhold pleaſe God to take the Queene's Majeſtie from us without Iſſue.

But lett us admit an Untruth, that there was no Will; to the Ende there may be nothinge imagined, that cannot juſtly be aunſwered; and that the Truethe (which for my parte I only deſire) may appeare to all Men: Who then is right Heyre to the Crowne? It will be ſayd, the *Scottiſhe* Quene; bycauſe ſhe comethe of the eldeſt Siſter, and is next of Blood to Kinge *H.* the viijth, accordinge to the Maxime of the Law.

True it is, there is ſuch a Maxime in the Law; but it may not ſo largely be taken; for it muſt be reſtrayned to ſuch, as be inheritable by the Laws of this Realme, which be borne within the King's Allegiaunce: For if

yow will put Straungers and right *Englishe* Men in one Case; What avayleth the Liberty of *Ingland*? What profitethe it to be an *Englishe* Man borne? For Straungers have not so great a Commodity in *Ingland* in all things, as *Inglish* Men have; for they be not onely not bound to serve the Realme, with their Witts; to mayntayne that with their Goods, and deffend it with their Bodyes and Blood as we be; but also they may come when they will; tarry as long as them listethe; and depart when it pleasethe them: Wherefore by Nature there ought to be great Difference betweene *Englishe* Men and Straungers; and that those onely shold enjoy the Sweete, that be bound to tast the Sower: And so our Lawes have provided, if we will suffer them to
28 E. 3. stand in Force: For the Statute of xxviij° *E. Tertij*, expoundinge the Law in this Case, sayeth, That the King's Children, whersoever they be borne, eyther within the Realme or without, be inheritable to their Auncestors: And that all others, which from that Time shall be borne out of the King's Allegyaunce, whose Fathers and Mothers at the Time of their Birthe be in the Faythe and Allegiaunce of the Kinge of *Ingland*, shold be in like manner inheritable to their Auncestors; wherby a Consequent may be gathered, (*à contrario sensu*) those that be borne of Father and Mother, that be not in the Faythe and Allegyaunce of the Kinge of *Ingland*, be not inheritable within this Realme. And so it appearethe (*Bracton*) that the Law before was; for he sayeth in the Title of Exceptions thus. *Sicut Anglicus non auditur implacitando aliquem pro terris & tenementis in Francia: Ita non debent alienigena & Francigena, qui sunt ad fidem regis Franciæ, audiri placitando in Anglia:* And in another place, *Lib.* iiij°. *De exceptione dilatoria: Bracton* sayeth thus; *Item, Responderi, quòd particeps, de quo dicitur, nil capere potest, quia est ad fidem Regis Franciæ, & ideo nil capere potest, antequam fiat.* And *Littleton* sayeth, as yow know, that in Actions Reall and Personall, by one borne out of the King's Allegyaunce, it is a good Plea for the Defendaunt to say, that the Playntife was borne out of the King's Allegyaunce.

But some say, that *Scotland* is a Member of the Crowne of *Ingland*, and therefore the People therin borne be in Allegiaunce of the Kinge of *Ingland*. Although *Scotland*

land of Right belongeth to the Crowne of *Ingland*; yet is it not a ſufficient Cauſe, that the People borne in *Scotland* be in the Kinge of *Ingland*'s Allegyaunce. It cannot be denyed, but that *Normandy* of Right belongeth to the Crowne of *England*; yet it followeth not therfore, that the *Normans* be in Allegiaunce of the Crowne and Kings of *Ingland*. No; albeit that *Normandy* belongeth to the Crowne of *England*; yet bycauſe the People there did decline from their Faith and Allegyaunce, that they ought to the Kinge of *Ingland*, and became ſubject, and gave their Faith and Allegiaunce to the *French* Kinge; their Lands were eſcheted, as appearethe by the Statute of *Prærogativa Regis*, *cap.* xij°. So in like manner, albeit *Scotland* belongeth of Right to the Crowne of *Ingland*; and that the King of *Scotland* have oft-times done their Homage therefore to the Kings of *Ingland*; yet we ſay, they have longe time forſaken their Faithe and Alleigaunce of *Ingland*, and have become Rebells, but rather have beene taken for Enemyes to *Ingland*; for they have uſually ranſomed upon their Taking, as Enemyes, and not been executed with Deathe, like Rebells. And by that meanes Kinge *Jemy*, Father to their Queene that now is, was at the Time of her Birthe, and of his Deathe, out of the Faythe and Allegiaunce of *Ingland*. Wherfore to ſay, that ſhe was borne within the King's Allegiaunce, becauſe ſhe was borne in *Scotland*, is a mere Cavillation, *ſecundum non cauſam ut cauſam*, more worthy to be laughed at, then to require any Aunſwere at all.

Now let us compare theſe things togither: You know, that the *Scottiſhe* Quene is not the Kinge of *Ingland*'s Child; nor was borne in the Kinge of *Ingland*'s Alleigaunce; nor yet come of Father and Mother in the Faythe and Alleigaunce of the Kinge of *Ingland*; nor is a Free-Woman in *Ingland*: Wherefore by the Lawes of *Ingland* ſhe can not inherite in this Realme. And if yow deſire a Præſident and Example for the very ſame Cauſe, that we now intreat of; yow may find it in the Chronicles, how *Margaret* the Daughter and Heyre of *Edward* the outlawed, Sonne and Heyre of *Ed. Ironſide* Kinge of *Ingland*, maryed to *Malcolyn* Kinge of *Scotts*, nor any of her Children never made any Clayme to the Crowne of *Ingland*; but bothe her Huſ-

band;

band, and her three Children after him, and their Iſſue, beinge Kings of *Scotland*, did Homage to the Kinge of *Ingland*.

But it will be ſayd, that Kinge *H.* the Second was borne out of the King's Allegiaunce, his Father was no Deniſon, and yet he inherited the Crowne.

True it is, that he was borne out of the King's Alleigiaunce: But whether he was made Free or not, that is uncertayne: Albeit it is to be ſuppoſed, that his Grandfather mindinge, that he ſhold ſuccede him, omitted nothing that ſhold ſerve for that Purpoſe.

But this may we know by our Chronicles, that he came in rather by Election, and Conſent of the Realme, then by Inheritaunce: For Kinge *H.* the Firſt procured, that the Clergy and Nobility ſhold be twiſe ſworne to the Succeſſion of *Maud* the Empreſſe, his Daughter, and her Heyres; and for breakinge that Othe, and receavinge Kinge *Stephan*, the Hiſtory ſheweth, that the Realme was marvayloufly plagued, and eſpecially the Clergy and Nobility; and that by Kinge *Stephan* himſelf: And beſids, if we will wayghe the Matter indifferently, we may truly ſay, that Kinge *Henry* the Second enjoyed the Crowne by Inheritaunce lawfully: For albeit, that *Maud* were not Queene of *Ingland de Facto*, yet ſhe was *de Jure*. For *Stephan* was but an Uſurper. And ſo Kinge *H.* the Second was the Queene's Child, which yow ſee by the Statute of *E.* 3. is free, wherſoever they be borne.

And other Objection there is of *Richard* the Second, how he was borne at *Burdeaux* out of the Realme, and yet was Kinge. To that I aunſwere, he had it juſtly; for he was borne of Father and Mother *Inglishe*, in the King's Alleigaunce, which is ſufficient, and alſo for Advauntage; for *Burdeaux* was then in the Fayth and Alleigiaunce of the Kinge of *Ingland*.

Thus I take it very playne, that the *Scottiſhe* Queene can make juſtly, by the Lawes of *Ingland*, no Clayme to the Crowne. Wherefore? bycauſe ſhe hath no Right in Law, nor Reaſon.

And therefore now we will proceed to the Examination of the Title of the Lady *Lennox*; whom perchaunce ſome will thinke to have the next Right; bycauſe ſhe

was

was Daughter of the Lady *Margaret*, the eldeſt Siſter of Kinge *H.* the viijth.

True it is, ſhe was her Daughter: But her Father, the Erle of *Angwiſhe*, was a *Scott*, an Alyen, and no Denizon.

But it will be ſayd; it maketh no matter, what her Father was, ſo that ſhe was borne in *Ingland* (as it cannot be denyed ſhe was;) for, as ſome ſay, the Law of *Ingland* doth allow every Perſone to be *Ingliſhe*, that was borne in *Ingland*, of what Nature ſoever his Parents be, if they were only *ad fidem Regis Angliæ*; that is, ſworne to be true to the Kinge of *Ingland*, and his Subjects, as the Earle of *Angwiſhe*, at the Birth of the Lady *Lennox* his Daughter, was not.

Perchaunce it might make ſomewhat to the Purpoſe, in the Opinion of the common People; albeit in very Deed, and by the Lawes of the Realme it ſeemeth nothing at all: For it appeareth in the 14 *E.* iij, and 14 *H.* vj, that albeit an Alien be ſworne to be true to the Kinge and the Realme in any Lete of Succeſſion, yet is he not abled therby to purchaſe Land; but muſt be enabled therunto expreſſely by the King's Letter Patents.

But that the Child ſhold inherite, and the Father not free in *Ingland*, it cannot but ſeeme very ſtraunge, how any ſuch Opinion ſhold be conceaved of any Man learned; for it differeth from the Lawes and Pollicyes of all other Places. The Law ſayeth, *Sequitur Patrem*; that is to ſay, the Child ſhall be accompted of that Nation, where his Father was borne. If the Father be *French*, wherſoever the Child be borne, it ſhall be accompted *French*; if the Father be an *Italian*, the Child muſt be an *Italian*; if the Father be *Duche*, the Child ſhall be *Duche*; except his Father have forſaken his owne Native Country; and hath not onely given his Fayth to another Prince of Eſtate, but alſo is admitted to be a Cityzen, or Freeman there.

And the Reaſon ſeemeth to be this; that ſith Man is naturally diſpoſed to live in ſome Socyety, (and indeede muſt needs ſo live, if he will be like to Man, and not wander Abroad like a Beaſt) he muſt joinn himſelfe to ſome Society or Congregation, wherin as he deſireth to enjoy the Benefits that grow of ſuch civil Society; ſo it

is meete and reasonable, that he shold be Partaker of the Burdens, and faithfully to maintayne that Society and defend it, by which he himselfe is præserved and maintayned. And bycause God first made Man, and of Man Woman; and hath also made him a more apter Instrument to serve in the Common Weale, in the Functions both of Body and Mind; therefore is Man præferred before the Woman, and thought the more worthy Person, not only by the Lawes of Nature, but also by all other Lawes, and also by the Lawes of this Realme, as appeareth 7 *E.* ij. And so the Children in all other Places follow the Condition and Estate of their Fathers, as the more worthy Person; which they do also here in *England*; for the Law in like manner sayethe, *partus sequitur Patrem*; which if it shold be expounded onely in Cases of the Bondman and his Wife, and that the Child shold be Bond or Free, accordinge to the Condition of the Father; then is it no Maxime, as the Law termeth it; for a Maxime is a Rule, that serveth to rule and decise more Matters and Cases then one.

But let us seeke, if we can find any Reason to maintayne this our Opinion, That every Person borne in *Ingland*, of what Nation soever the Parents be, shall be free; for Positive Law written ther is none to maintayne it; except yow will take for Positive Law written, that which is conteyned in the Booke of the Exposition of the Formes of the Lawes of *Ingland*, which of what Auctthoritye it is, I know not. But what sayeth the Booke? Veryly thus: Yf an Alien come and dwell in *Ingland*, beinge none of the King's Enemyes, and there hath Issue, this Issue is not Alien, but *Inglishe*.

But no such Alien was the Erle of *Angwishe*; for, as the Chronicle witnesseth, he cam not into *Ingland*, with a mind to tarry and inhabite here, but after he had maryed the *Scottishe* Queene, both without Kinge *H.* her Brother's Assent, and also agaynst the whole Counsayle of *Scotland*, there fell such a Varyaunce betweene them and the Lords of *Scotland*, that she and the Earle, like banished Persons, fled into *Ingland*, and wrote unto the Kinge for Mercy and Comfort in his great Distres. The Kinge enclined to Mercy, sent them Apparell, and all other Things necessary, willinge them to lye still in *Northumberland*, till they knew further of his Pleasure.

Wher-

Wherupon they continued and kept at *Harbottell*, where ſhe was delivered of the ſayd Lady *Lennox*; and after Kinge *H.* ſent for her, and her Husband the Earle, to come to the Court, which they promiſed ſo to doe: But ſecretly the ſayd Earle of *Angwiſhe* fled backe into *Scotland*, (belike to his other Wife, as yow ſhall hereafter heare) miſtruſtinge, leſt the Kinge had had Underſtandinge, how he had diſtayned and abuſed his Siſter, and ſo ſhe came without the Earle to the Court. Now when Kinge *H.* had hard, that the Earle of *Angwiſhe* was ſo departed, he beinge greatly therwith diſpleaſed, ſayd it was done like a *Scott*; and ſo, after that the Queene had taryed one whole Yeare in *Ingland*, ſhe retorned into *Scotland*; wherby it may appeare, that the ſayd Earle of *Angwiſhe* is not of that Sort of Aliens, that the ſayd Booke of the Expoſition of the Termes of the Lawes of *Ingland* ſpeaketh of; for he cam not into *Ingland* to dwell, nor had any Dwellinge place there; but rather was to be adjudged a Gueſt; or as a Bird that leaveth for a time her native Country, while the fowle Weather laſteth; or as a wild Beaſt, that is chaſed with Hounds out of his Haunt, and flyeth till he perceave they perſecute him no longer. And ſo the Lady *Lennox* can clayme no Benefitt at all by this Law, (if it be taken for a Law) but rather it maketh alltogether agaynſt her. Moreover, Statute ther is none to mayntayne this Opinion, that ſayeth, every Perſon is *Ingliſhe*, that is borne in *Ingland*, of whatſoever Nation his Parents be. Then of Neceſſity it muſt be by Cuſtome, if it be not by Law, which having no Reaſon to mayntayne it; or if it be contrary to Reaſon, it is no Law, have it had never ſo long Continuance.

But this is rather a great Evill to be aboliſhed, as the Lawes of this Realme do playnely teach us; for they ſay, Cuſtoms not grounded upon Reaſon, cannot preſcribe. But you will ſay, the Reaſon is, to entiſe Straungers to come and inhabite the Realme. But what Intiſement can that be, when they themſelves by their Cominge ſhall not be made free, nor may purchaſe any Land to leave to their Poſterity? And albeit that Reaſon mayntayneth this Cuſtome, yet can it not ſerve the Lady *Lennox*: For her Father the Earle cam not into this Realme to inhabite and dwell in the ſame, as before is ſufficiently declared. Perchaunce it will be ſayd, that it is the Nature

ture of the Soyle, to make ſuch as be borne in *England* free in *England*: But then how happeneth it, that this Property is private to *England*, and not common to all other Countryes? Truly this is not allowed in any other Country, and not without good Reaſon: For Diviſion of Kingdomes and States, Ordinaunces of Cityes and Common Weales, and the Libertyes and Franchiſes thereof, is not by Nature, but commeth of Conſent of Men, and by Man's Law; and they receyved none to be free in their Common Weale, but ſuch as eyther for their Fayth, their Parents being free, and Citizens borne thereunto, they do not ſuſpect, but that they will walke in the Steppes of their Parents Fidelity; or els ſuch, as upon great Conſideration, and with Promiſe of their Fidelity and Allegiaunce, they do newly admit to be Citizens; of which Nomber younge *Baber* cannot be; for *Simplicitèr* the Magiſtrate can have no Reſpect of them; neyther be they meete, nor able to make any Promiſe of Band or Fidelity to the Common Weale; for as the Common Weale is bound to maintayne and preſerve thoſe that are free, from Injuryes, Wrongs, and Injuſtice; even ſo doth it require of them Promiſe to be true therunto, to ſerve, helpe, and defend it to ther utterموſt Power.

And marke, I pray yow, into what Abſurdity yow fall into, if this ſhold be admitted for Law, that every one borne in *England* ſhold be free in *England*, of whatſoever Nation his Parents were.

I ask this Queſtion: If the Child of an Alien borne in *England*, be free in *England* by his Birth; and by Reaſon likewiſe, that his Father being a *Scott*, be free alſo in *Scotland*, (as doubtleſs by their Law he is, wherſoever he be borne) if Warres ſhold happen, as it hath many times done, betweene theſe two Realmes; whoſe Part ſhall this Child take?

No Man can ſerve two Maſters at one time, (ſayeth the right Law-Maker, and alſo common Reaſon) yf this Child ſo borne, as I have before ſayd, follow the *Scottiſhe* Part, then is he a Traytor to *Ingland*; and in like manner a Traytor to *Scotland*, if he take Part with *Ingland*: But if he will take Part with neyther of them, then he is a Traytor to both of them.

For

For every Man by the Law of Nature, which is God's Law, and by the Lawes of each Realme, is bound to declare himselfe a Member to one Commonwealthe, or other, (that is) to bestow Life and Goods therof when neede requireth; therefore I aske, which Part it is like he will take, that is thus a Mongrill of two Nations. Truly, in my Judgment, there is no Reason, eyther to move *Ingland*, or *Scotland*, to thinke, that such a Person can be true to any of them both; for it hath beene a Principle receyved of all Men, as long as Citizens and Estates of Commonweales have beene, that no Man can be a Citizen of two Cytyes, or a good Member of two Commonweales; bycause he can not serve them both at once. Wherefore I can not see, that this Proposition (that every Person borne in *Ingland*, of what Nation soever his Parents were, shold be free in *Ingland*) can be justified by any Reason; and therfore the Lady *Lennox* can take no Benefitt therby.

But admit the Law of the Realme were certayne, that all Children borne within the Realme, shold be free of whatsoever Nation the Parents were; yet if it be true that is reported, the Lady *Lennox* is clerely excluded by the Law of the Realme, to be Heyre to any Person of any Possession within this Realme: for it is said, that at that time, when her Father the Earle of *Angwishe* was maryed to the *Scottishe* Queene, her Mother, he had another Wife livinge; wherefore there was a Divorse sued betweene him and the *Scottishe* Queene; and after the same Divorse, the *Scottishe* Queene (in the Life of the Earle of *Angwishe*, the sayd Lady *Lennox* Father) maryed the L. of *Mussin*, with whom she continewed all her Life longe as Man and Wife.

But it may be sayd, that that Divorse can not disable the Lady *Lennox* to be Inheritor to her Mother the *Scottishe* Queene; for albeit he had another Wife livinge at that Time, that he maryed the *Scottishe* Queene; yet forasmuch as she was ignorant therof, and maryed him (*bonâ fide*) the Child borne of them is by the Common Law lawfull. True it is, that by the Common Law she is Legitimate; but the Lawes under which we be borne, and by the which we must be judged, and wherby also the Cases of Inheritance be and must be ruled, do not al-

low her for Legitimate, as they do not likewise others in other Cases.

The Cannon Law sayeth, If a Man have begotten a Child of a Woman unmaryed, and after the Birth of the Child do marry her, the Child shall be accounted legitimate, as if it had beene borne in lawful Matrimony: But the Lawes of *Ingland* be, and alwayes have beene contrary, that it shall not be counted legitimate. Albeit great Suite have beene made to the contrary, to make the Lawes of the Realme to agree with the Cannon Lawes in this Poynt, as appeareth by the Statute of *Merton*, cap. ix.

So albeit the Cannon Law alloweth the Child borne in the second Mariage, the first not being dissolved, to be lawfull, if any of the Parents thinke the Mariadge good; yet do not the Lawes of the Realme allow the same: But bycause the first Mariadge was never lawfully dissolved, and that one Man can have but one Wife at once, it accompteth the second Mariadge voyd; and the Child born therin is accompted a Bastard, and not inheritable within this Realme; as appearethe by *Glanvile*, *Bracton*, and *Britton*, and all the whole Course of the Lawes receaved, and used, from the Beginninge unto this present Time; wherfore the Lady *Lennox* can extend justly no Manner of Title to the Crowne of *Ingland*. So it may appeare by the Lawes of this Realme, that neyther the *Scottishe* Queene, nor yet the Lady *Lennox* have any manner of Title to the Crowne of *Ingland*, be they never so neare of Blood; the one, bycause she is not the King's Child, nor free in *Ingland*; the other, bycause (if she were free) the Lawes do not allow her legitimate, and inheritable in this Realme,

And therefore as to the next of Blood, and true and just Heyre by our Lawes, the Crowne ought to discend to the Heyres of the *French* Queene, which be the Daughters of the Lady *Frauncis*, and the Lady *Elianor*, and præsently to the Lady *Catherine*, beinge eldest Daughter of the eldest Sister the Lady *Frauncis*. Agaynst these Heyres of the *French* Queene, these are objected: They say, these cannot inherite; why so?

Bycause they were not lawfully borne; for *Charles* Duke of *Suffolk* had at that Time he maryed the *French* Queene,

Queene, another Wife livinge, that is, the Lady *Mortymer.*

To this I aunſwere, that albeit it were true, that the Lady *Frauncis* and the Lady *Elianor* were not lawfully borne, as it is not true, (as yow ſhall heare hereafter) yet it hurteth not the Title of their Heyres, given by Kinge *Henry* his Will; for it is appoynted to the Heyres of them, and not to themſelves, as the Will playnly declareth.

But verily this is a mere Slaunder, growen altogether upon Malice, and no Accuſation made upon any juſt Præſumption; for I beſeech yow tell me, is it like, or can any reaſonable Man thinke, that if Duke *Charles* had had another Wife livinge, when he maryed the *French* Queene, that Kinge *H.* wold have conſented, that his Siſter ſhold have receaved ſo great Injury, that ſhe ſhold have bene kept like a Concubyne? Wold his Counſayle have ſuffered ſo great an Infamy to have come to his Majeſty's Stocke? Or wold the Nobility of the Realme, with ſuch Triumphe, have honored ſo unlawfull an Acte? Wold the common People, who many times be ready to ſpeak Evil of Well-doinge, have holden their Toungs in ſo manifeſt Adultery? Is it like, that in ſo long time, that the *French* Queene and the Duke lived together, as Man and Wife, (that was all the Life of the *French* Queene) that ſhe ſhold not have heard of it?

Was it poſſible, that amongeſt ſo many Women, which dayly reſorted to her (whoſe Nature yow know is to ſeeke for all ſuch Things, be they never ſo ſecret, and to communicate them to others) that none wold have told her of it? Or is it to be believed, that ſhe, contrary to the Nature of all other Women, wold have bene contented, that another ſhold have bene Partaker of that Fleſh, which ſhe, according to God's Word, tooke only to be her owne? Or can any Man thinke, that any Woman can be contented to live in meane Degree, when ſhe may be a Duches, as the Lady *Mortymer* might have bene juſtly, if ſhe had bene the Duke's Wife? Surely there is no Reaſon to make any Man to thinke ſo; then muche leſſe to report ſo. But ſuppoſe, that the Duke had had another Wife livinge, at the Time he maryed the *Frenche* Quene; yet for as much as

he

he and ſhe were maryed together openly, contynued all their Lives as Man and Wife together, and nothinge ſayd agaynſt them, and every Man tooke them for Man and Wife; and that the Lady *Frauncis*, and the Lady *Elianor* were not taken to be Baſtards duringe their Lives: Now, after their Death, neyther they, nor their Children may, by the Lawes of this Realme, be accompted ſoe. *Nec juſtum eſt aliquando mortuum facere Baſtardum, qui toto tempore ſuo tenebatur pro legitimo*, as appeareth by a Judgement given at *Weſtminſter*, in the xiij *E.* 3.

But for the Declaration of the Trueth of this Matter, and to put out of the Heades of the People this fond Opinion and Talke, which is onely moved of Malice, and commeth not of any certayne Knowledge, and encreaſed by light Creditt without Conſideration, and maintayned by ſuch, as no doubt paſſe ſo much upon the Trueth, as deſirous to ſatisfy their froward Affections.

Yow ſhall underſtand, that the Duke of *Suffolke*, *Charles Brandon*, beinge in the Court, livinge ſole and unmaryed, made a Contract of Matrimony with one Mrs. *Anne Browne*; but before any Solempnization of Mariadge, not onely had a Daughter by her (which after was maryed to the Lord *Powes*) but alſo brooke Promiſe with her, and openly and ſolemply maryed with the Lady *Mortymer*; which Maryadge the ſayd Mrs. *Anne Browne*, judicially accuſed to be unlawfull; for that the ſayd Sir *Charles Brandon* had not onely made a præcontracte with her, but alſo had carnally knowen her; which Things being duly proved, and Sentence of Divorſe betweene the ſayd Sir *Charles* and the Lady *Mortymer* given and denounced; he maryed ſolemply the ſayd Mrs. *Anne Browne*, at the which Maryadge all the Nobility were præſent, and did honor it. And afterwards the ſayd Sir *Charles* had by the ſaid Mrs. *Anne Browne* another Daughter, which was maryed to the L. *Mounteagle*.

After this the ſayd Mrs. *Anne Browne* continewed with him all her Life as his Wife, and dyed his Wife, without any Impechement of the Mariadge: After whoſe Death Kinge *Henry*, having him in great Favor, intended he ſhold for his better Præferrment have ma-

ryed

ryed the Lady *Lisle*, beinge a younge Mayd, and an Inheritor; whereupon the sayd Sir *Charles* was created Vicount *Lisle*. But that Mariadge by reason of her Youth took no Place. After this he was created Duke of *Suffolke*, about which Time *Lewis* the *Frenche* Kinge dyed: And leavinge the sayd Lady *Mary* (Daughter to Kinge *H.* the vijth) Widdow; the sayd *Charles* Duke of *Suffolke* was sent into *Fraunce* for her; and with the Consent of Kinge *H.* maryed her twise; first secretly in *Fraunce*, and after openly here in *England* (as before is declared) and so they lived togither all their Lives longe, as Man and Wife; and were so accepted and taken of all Parts, and no Persons impungninge or gaynsayeinge of the same: For there was no just Cause. After this they had Issue betweene them, that is the Lady *Frauncis*, and the Lady *Elianor*.

Agaynst whom the Lady *Powes*, their base Sister, in the Time of Kinge *Ed.* vjth, alledgyd Bastardy. But yet notwithstanding that, they were both by the Lawes of the Realme, and by the Cannon Lawes, declared to be legitimate, and approved to be borne in lawfull Matrimony; so as no Man can say they be Bastards. And if that they cold, yet at this præsent, bycause it was adjudged for them, that it was not soe; and also, for that they both be dead, and dyed taken as Legitimate, he ought not to be hard by Order of any Law in the World, if he wold object it agaynst them. But havinge no Occasion or Similitude of Truthe in the Spewinge out of this their malicious Stomachs, is rather to be reproved as a Slaunderer, and as a sedicious Person goinge about to sow Sedition and Discord in the Commonweale, to be punished even as one, which seeketh by all meanes to move Civill Warres in this Realme, and to bringe it to Destruction; and therefore as a Traytor to be taken to the Realme, and even as one purposinge to subvert the good Providence of Almighty God, as God's Enemy to be adjudged, taken, and used.

Thus have I declared unto yow my Judgement touchinge the right Heyres to the Crowne of *England* in Remaynder and Reversion; which is, as I take it, præsently the Lady *Catherine*, Daughter to the Lady *Frauncis*, both by Kinge *H.* his Will, and also by the Common Lawes of this Realme; and that we be bound both by our Othes and also by our Lawes so to take her.

 But

But if we ſhall for any Affection take away the Right from thoſe, that have the Right, and which juſtly ought ſo to have; then let us remember this Sayinge and perilous Threatninge of the Holy Ghoſt; *Propter injuſticias & injurias, transferretur regnum à gente in gentem.*

And thus ſimply have I put this Queſtion and Doubt in Writinge, to the ende it may the better and more perfectly be aunſwered: And if any Man will take the Paynes to do it, I require it may be done in Writinge; ſo ſhall it quickly come to an Iſſue; and if he can confound by juſt Argument that, which I have before alleadged, he ſhall both ſatisfye my Expectation, and alſo finde me ready to ſay as he ſayeth. But if he cannot, then I require him for God's ſake, and for the Love of his Country, to give Place to the Trueth quietly.

DIXI.

Ad p. 206.

NUMB. VIII.

30 Decemb. 1546. 38 H. 8.

A Copy of Henry VIII.'s *Will, taken from the Exemplification, that was enrolled in* Chancery, *and is ſince loſt; which being more Correct than that printed in* Fuller's Church Hiſtory, *was thought proper to be lay'd before the Reader, for his better Information in the Controverſy thereto relating.*

Irrot' in Dorſ' Clauſ' Cancellar' Dni nri Regis Edwardi Sexti de Anno Regni ſui Primo.

Henry R.

IN the Name of God, and of the Glorious and Bleſſed Virgin our Lady Sainct *Mary*, and of all the Holy Company of Heaven.

We *Henry* by the Grace of God King of *England*, *Fraunce* and *Irlande*, Defender of the Faith, and in Erth ymediately under God the ſupreme Hed of the Church of *England* and *Irlande* of that Name Theight, calling

*es, &c. to our Remembraunce the great Gifts and Benefits of Almighty God given unto us in this Tranſitory Lief, give unto Him our moſt lowly and humble Thanks, knowledging ourſelf insufficient in any part to deſerve

or

or recompence the ſame. But feare that we have not worthely received the ſame.

And conſidering further alſo with ourſelf, that we be, as all Mankind is, mortal and born in Sinne, believing nevertheles, and hoping that every Chriſtien Creature lyving here in this tranſitory and wretched Woorld under God, dying in ſtedfaſt and perfaict Faith, endeavoring and exerciſing himſelf to execute in his Lief Tyme, if he have Leaſur, ſuch good Dedes and charitable Works, as Scripture commandeth, and as may be to the Honour and Pleaſeur of God, is ordeyned by Chriſte Paſſion to be ſaved, and to atteyn Eternall Lief; of which Nombre we verily truſt by his Grace to be oon.

* ur &c. an eur.

And that every Creature, the more high that he is in Eſtate, Honor, and Authorite in this Woorld, the more he is bounde to love, ſerve, and thank God, and the more diligently to endeavour himſelf to do good and charitable Works to the Lawde, Honour, and Praiſe of Almighty God, and the Profit of his Sowle.

We alſo calling to our Remembrance the Dignite, Eſtate, Honour, Rule, and Gouvernance, that Almighty God hath called us unto in this Woorld, and that neither We, nor any other Creature mortall knowith the Tyme, Place, whenne, ne where it ſhall pleas Almighty God to call him out of this tranſitory Woorld. Willing threfore and minding with Gods Grace before our Paſſage out of the ſame, to diſpoſe and ordre our latter Mynd, Will, and Teſtament in that ſort, as we truſt it ſhall be acceptable to Almighty God our only Savyour *Jeſus Chriſt*, and all the hole Company of Heaven, and the due Satesfaction of all godly Brethren in Erth. Have therefore, now being of hole and perfaict Mynde, adhering holy to the right Faith of *Chriſt* and his Doctrine, repenting alſo our old and deteſtable Lief, and being in perfaict Will and Mynd by his Grace never to return to the ſame, nor ſuch like; and minding by Gods Grace never to vary therefro as long as any Remembraunce, Breth, or inward Knowledge doth, or may remayn within this mortall Body, mooſt humbly and hartly do commend and bequeyth our Soull to Almighty God, who in Perſonne of the Sonne redeamed the ſame with his mooſt precious Body and Blood in Tyme of his Paſſion. And for our better Remembraunce

thereof,

thereof, hath left here with us in his Church Militant, the Consecration and Administration of his precious Body and Blood, to our no little Consolation and Comfort, if we as thankfully accept the same, as he lovingly, and undeserved on Man's behalf, hath ordeyned it for our only Benefit, and not his. Also we do instantly requyre and desire the Blessed Virgin *Mary* his Mother, with all the Holy Company of Heaven, continually to Pray for us, and with us, whiles we lyve in this Woorld, and in the Tyme of passing out of the same, that we may the sooner atteyn Everlasting Lief after our Departure out of this transitory Lief, which we do both hope and clayme by *Christs* Passion and Woord. And as for my Body, which whenne the Soul is departed, shall thenne remayn but as a Cadaver, and so return to the vile Matter it was made of; wer it not for the Rowme and Dignitye, which God hath called us unto; and that we woold not be noted an Infringer of honest worldly Policies and Custumes, whenne they be not contrary to Gode Lawes; We woold be content to have it buryed in any Place for Christien Folke, were it never so vile; for it is but Ashes, and to Ashes it shall again. Nevertheles, bicaus we woold be lothe in the Reputation of the People, to do Injurye to the Dignite, which we unworthily are callid unto:

We are content, and also by these Presentes our last Will and Testament do Will and Ordeyn, that our Body be buryed and enterred in the Quere of our College of *Windesour*, Midway between the *Statte* and the high *Auttare*, and there to be made and sette, assone as conveniently may be doon after our Deceasse, by our Executours, at our Coste and Charge, if it be not done by us in our Life-time, an honorable Tombe for our Bones to rest in, which is well onward, and almoost made therefor alredye, with a fayre Grate about it; in which we will also, that the Bones and Body of our true and loving Wief Queene *Jane* be put also; and that there be provided, ordeyned, made, and sett, at the Coste and Charge of us, or of our Executours, if it be not done in our Life, a convenient Aulter, honorably prepared, and apparailled with all Maner of Thinges requisite and necessary for Dayly Masses, there to be sayd perpetuelly, while the Woorld shal endure.

Also

Alſo we will, that the Tombes and Aultars of King *Henry* the vjth, and alſo of King *Edward* the ivth our Great Uncle and Graunt-Father, be made more Princely, in the ſame Place where they now be, at our Charge.

And alſo will and ſpecially deſyre and requyre, that where and whenſoever it ſhall pleas God to call us out of this World Tranſitory to his Infinite Mercy and Grace, be it beyonde the See, or in any other Place without our Realme of *England*, or within the ſame, that our Executours, aſſoon as conveniently they may, ſhall cauſe all Divine Service accuſtumed for Dead Folke to be celebrate for us, in the nixt and moſt propire Place where it ſhall fortune us to depart out of this Tranſitory Lief.

And over that we will, that whenſoever or whereſoever it ſhall pleas God to call us out of this Tranſitory Lief to his Infinite Mercy and Grace, be it within this Realme, or without, that our Executours, in as goodly, brief, and convenient haſt, as they reaſonably canne, or may, ordeyn, prepare, and cauſe our Body to be removed, conveyed, and brought into the ſayd College of *Windeſour*; and the Service of *Placebo* and *Dirige*, with a Sermon and Maſſe on the Morowe, at our Coſte and Charge, devoutly to be done, obſerved, and ſolemply kept, there to be buryed and enterred in the Place appointed for our ſayd Tombe, to be made for the ſame Entent; and all this to be doon, in as devout wiſe, as canne, or may be doon; and we will and charge our Executours, that they diſpoſe and give in Aulmes to the mooſt poore and nedy People, that may be found, commyn Beggars, as moch as may be, avoyded, in as ſhort Space as poſſibly they may, after our Departure out of this Tranſitory Lief, Oon Thouſand Marke of Lawfull Money of *England*, Part in the ſame Place, and thereabout, where it ſhall pleas Almighty God to call us to his Mercy, Part by the way, and Part in the ſame Place of our Buryall, after their Diſcretions; and to move the poore People, that ſhall have our Almez, to pray hartly unto God for Remiſſion of our Offenſes, and the Wealth of our Soul.

Alſo we woll, that with as convenient Spede as may be doon after, our Departure out of this Woorld, if it be not doon in our Life, that the Deane and Channons of

our Free Chaple of Sainct *George*, within our Castle of *Windesor*, shall have Manours, Lande, Tenement, and Spiritual Promotions, to the Yerly Value of Sixe Hundred Pounde, over all Charge made sure to them, to them and their Successours for ever, upon these Conditions hereafter ensuying.

And for the due and full Accomplishment and Parformaunce of all other Things conteyned with the same, in the Forme of an Indenture, signed with our oun Hande, which shall be passed by way of Covenaunt for that Purpose, betwen the sayd Deane and Cannons, and our Executours, if it passe not betwen us and the sayd Deane and Cannons *in our Lief; that is to saye, the sayd Deane and Cannons*, and their Successours for ever, shall synde twoo Priests to say Masses at the sayd Aulter, to be made where we have before appointed our Tombe to be made and stand; and also, after our Decease, keepe yerely Four solempe *Obits* for us within the sayd College of *Windesour*; and at every of the same *Obits*, to cause a solempne Sermon to be made.

Int' Lin'.

And also, at every of the sayd *Obits*, to give to poore People in Almez, Tenne Pounds.

And also to give for ever yerly, to Thirtene poore Men, which shall be called Poore-Knights, to every of them Twelf Pens every Daye, and ones in the Yere yerely for ever, a long Goune of White Cloth, with the Garter upon the Brest, embrodered with a Shelde and Crosse of Sainct *George* within the Garter, and a Mantel of Red Cloth; and to such one of the sayd Thirtene Poore Knights, as shall be appointed to be Hed and Governour of them, iij *l.* vj *s.* viij *d.* yerely for ever, over and beside the sayd Twelf Pennes by the Day.

And also to cause every *Sonday* in the Yere for ever, a Sermon to be made for ever at *Windesour* aforesayd, as in the sayd Indenture and Covenaunt shall be more fully and particularly expressed. Willing, charging, and requyring our Sonne Prince *Edward*, all our Executours and Counsellours, which shall be named hereafter, and all other our Heirs and Successours, which shall be Kings of this Realme, as they will aunswer before Almighty God at the dreadful Day of Judgment, that they, and every of them do see, that the sayd Indenture and Assurance to be made betwene us and the sayd Deane

and

and Channons, or betwen them and our Executours, and all Things therein conteyned, may be duely put in Execution, and obſerved and kept for ever perpetuelly, according to this our Laſt Will and Teſtament.

And as concerning the Ordre and Diſpoſition of Thimperial Croune of this Realme of *England* and *Irland*, with our Title of *Fraunce*, and all Dignityes, Honours, Preeminences, Prerogatives, Authorityes, and Juriſdictions to the ſame annexed, or belonging, and for the ſure Eſtabliſhment of the Succeſſion of the ſame.

And alſo for a full and plain Gift, Diſpoſition, Aſſignment, Declaration, Limitation, and Appointment, with what Conditions our Doughters *Mary* and *Elizabeth* ſhall ſeverally have, hold, and enjoye the ſayd Imperial Crowne, and other the Premiſſes, after our Deceaſe; and for Default of Iſſue, and Heirs of the ſeveral Bodyes of us, and of our Sonne Prince *Edward*, lawfully begotten, and his Heires.

And alſo for a full Gift, Diſpoſition, Aſſignment, Declaration, Limitation, and Appointement, to whom, and of what Eſtate, and in what Manner, Form, and Condition, the ſayde Imperial Crowne, and other the Premiſſes ſhall remayne, and cum after our Deceſſe; and for Default of Iſſue, and Heires of the ſeveral Bodyes of us, and of our ſayd Sonne Prince *Edward*, and of our ſayd Doughters *Mary* and *Elizabeth*, lawfully begotten; we, by theſe Preſents, do make and declare our Laſt Will and Teſtament, concerning the ſayd Imperiall Crowne, and all other the Premiſſes, in Manner and Form following:

That is to ſay, we will by theſe Preſents, that immediately after our Departure out of this preſent Lief, our ſayd Sonne *Edward* ſhall have and enjoye the ſayd Imperiall Crowne and Realme of *England* and *Irlande*, our Title to *Fraunce*, with all Dignityes, Honours, Preeminences, Prerogatives, Authorites, and Juriſdictions, Lands, and Poſſeſſions to the ſame annexed, or belonging, to him, and to his Heires of his Body lawfully begotten.

And for Default of ſuch Iſſue of our ſayd Sonne Prince *Edward*'s Bodye lawfully begotten, we will the ſayd Imperiall Crowne, and other the Premiſſes, after our two Deceaſſe, ſhall holly remayn and cum to the

Heires

Heires of our Body lawfully begotten of the Body of our entierly beloved Wief Quene *Katheryn* that now is, or of any other our lawfull Wief, that we ſhall hereafter marry.

And for Lack of ſuch Iſſue and Heires, we will alſo, that after our Deceaſſe, and for Default of Heires of the ſeveral Bodyes of us, and of our ſayd Sonne Prince *Edward* lawfully begotten, the ſayd Imperial Crowne, and all other the Premiſſes, ſhall holly remayn and cum to our ſayd Doughter *Mary*, *and the Heires of her Body* lawfully begotten, upon Condition, that our ſayd Doughter *Mary*, after our Deceaſſe, ſhall not mary, ne take any Perſonne to her Husbande, without the Aſſent and Conſent of the Privy-Counſaillours, and others appointed by us, our deereſt Sonne Prince *Edward* aforeſayd to be of Counſail, or of the mooſt Part of them, or the mooſt Part of ſuch as ſhall then be alyve, thereunto before the ſayd Mariage had in Writting, ſealed with their Seales.

Int' Lin'.

All which Condition we declare, limite, appoinct, and will by theſe Preſents, ſhall be knitt and inveſted to the ſayd Eſtate of our ſayd Doughter *Mary* in the ſayd Imperial Crowne, and other the Premiſſes. And if it fortune our ſayd Doughter *Mary* to dye without Iſſue of her Body lawfully begotten, we will, that after our Deceaſſe, and for Default of Iſſue of the ſeveral Bodyes of us, and of our ſayd Sonne Prince *Edward*, lawfully begotten, and of our Doughter *Mary*, the ſayd Imperial Crowne, and other the Premiſſes ſhall holly remayn and cum to our ſayd Doughter *Elizabeth*, and to the Heires of her Body lawfully begotten, upon Condition that our ſayd Doughter *Elizabeth*, after our Deceaſſe, ſhall not mary, nor take any Perſonne to her Husbande, without the Aſſent and Conſent of the Privy-Counſaillers, and others appoincted by us to be of Counſaill with our ſayd deereſt Sonne Prince *Edward*, or the mooſt Part of them, or the mooſt Part of ſuch of them, as ſhall be thenne enlyve, thereunto before the ſayd Mariage had in Writting, ſealed with their Seales; which Condition we declare, limite, appoint, and will by theſe Preſents, ſhall be to the ſayd Eſtate of our ſayd Doughter *Elizabeth* in the ſayd Imperial Crown, and other the Premiſſes, knitt and inveſted.

And

And if it ſhall fortune our ſay'd Doughter *Elizabeth* to dye without Iſſue of her Body lawfully Begotten, we will, that after our Deceaſe, and for default of Iſſue of the ſeverall Bodyes of us, and of our ſay'd Sonne Prince *Edward*, and of our ſay'd Doughters *Mary* and *Elizabeth*.

We will that the ſay'd Imperial Crown and other the Premiſſes, after our Deceaſſe, and for default of Thiſſue of the ſeverall Bodyes of us, and of our ſay'd Sonne Prince *Edward*, and of our ſay'd Doughters *Mary* and *Elizabeth*, lawfully Begotten, ſhall holly remayn and cum to the Heires of the Body of the Lady *Fraunces* our Niepce, eldeſt Doughter to our late Suſter the *French* Quene, lawfully Begotten; and for default of ſuch Iſſue of the Body of the ſay'd *Fraunces*, we will that the ſay'd Imperial Crowne and other the Premiſſes, after our Deceaſſe, and for default of Iſſue of the ſeveral Bodyes of us, and of our Sonne Prince *Edwarde*, and of our Doughters *Mary* and *Elizabeth*, and of the Lady *Fraunces*, lawfully Begotten, ſhall holly remayn and cum to the Heires of the Body of the Lady *Elyanore* our Niepce, ſecond Doughter to our ſay'd late Siſter the *French* Quene, lawfully Begotten. And if it happen the ſay'd Lady *Elyanore* to dye without Iſſue of her Body lawfully Begotten, we will, that after our Deceaſſe, and for default of Iſſue of the ſeveral Bodyes of us, and of our ſay'd Sonne Prince *Edwarde*, and of our ſay'd Doughters *Mary* and *Elizabeth*, and of the ſay'd Lady *Fraunces*, and of the ſay'd Lady *Elyanore*, lawfully Begotten, the ſay'd Imperial Crowne, and other the Premiſſes, ſhall holly remayn and cum to the next rightfull Heirs. Alſo we will, that if our ſay'd Doughter *Mary* doo mary without the Conſent and Agreement of the Privy Counſayllours, and others appoincted by us to be of Counſail to our ſay'd Sonne Prince *Edwarde*, or the mooſt Part of them, or the mooſt Part of ſuch of them as ſhall thenne be alyve, thereunto before the ſay'd Mariage had in Writting, ſealed with their Seales, as is aforeſaid; that thenne and from thensforth, for lack of Heires of the ſeveral Bodyes of us, and of our ſaid Sonne Prince *Edwarde*, lawfully Begotten, the ſayd Imperial Crown, and other the Premiſſes ſhall holly remayn, be, and cum to our ſay'd Doughter *Elizabeth*, and to the Heires of her

Body, lawfully Begotten, in ſuch Maner and Forme, as though our ſay'd Daughter *Mary* wer thenne dead, without any Iſſue of the Body of our ſay'd Doughter *Mary*, lawfully Begotten, any thing conteyned in this our Will, or in any Act of Parliament, or Statute to the contrary, in any wiſe notwithſtanding; and in caſe our ſay'd Doughter the Lady *Mary*, do kepe and parforme the ſay'd Condition, expreſſed, declared, and limited to her Eſtate in the ſay'd Imperial Crowne, and other the Premiſſes by this our laſt Will declared.

And that our ſay'd Doughter *Elizabeth* for her Parte, do not kepe and parforme the ſay'd Condition declared and limited by this our laſt Will, to the Eſtate of the ſay'd Lady *Elizabeth*, in the ſay'd Imperial Crown of this Realme of *England* and *Irlande*, and other the Premiſſes, we will that thenne and from thensforth, after our Deceaſſe, and for lack of Heires of the ſeverall Bodyes of us, and of our ſay'd Sonne Prince *Edwarde*, and of our ſay'd Daughter *Mary*, lawfully Begotten, the ſay'd Imperial Crown, and other the Premiſſes, ſhall holly remayn and cum to the next Heires, lawfully Begotten, of the Body of the ſay'd Lady *Fraunces*, in ſuch Manner and Forme, as though the ſay'd Lady *Elizabeth* wer then dead, without any Heire of her Body lawfully Begotten. Any thing conteyned in this Will, or in any Act, or Statute to the contrary notwithſtanding.

The Remaindres over, for lack of Iſſue of the ſay'd Lady *Fraunces* lawfully Begotten, to be and continue to ſuch Perſonnes like Remaindres and Eſtate, as is before limited and declared.

Alſo we being now at this Tyme, thanks be to Almighty God, of perfaict Memory, do conſtitute and ordeyne theſe Perſonages following our Executours, and Parformers of this our laſt Will and Teſtament, willing, commaunding, and praying them to take upon them Thoccupation and Parformance of the ſame, as Executours.

That is to ſay, Tharchebiſhop of *Cantorbury*, the Lord *Wriothesly* Chancellor of *England*, the Lord *St. John* Maſter of our Houſe.

Therle of *Hertford*, Great Chambrelain of *Englande*.

The Lord *Ruſſel*, Lord Privy Seale.

The Viſconte *Liſle*, High Admiral of *Englande*.

The

The Bishop *Tunstall* of *Duresme.*

Sir *Anthony Brown* Knight, Master of our Horse.

Sir *Edward Mountagu* Knight, Chief Juge of the Commyn Place.

Justice *Bromley.*

Sir *Edward North* Knight, Chancellour of Thaugmentations.

Sir *William Paget* Knight, our Chief Secretary.

Sir *Anthony Denny*, Sir *William Harbard* Knights, chief Gentlemen of our Privey Chambre.

Sir *Edward Wootton* Knight, and Mr. Doctor *Wootton* his Brother.

And all these we woll to be our Executours and Counsaillours of the Privy Counsaill with our say'd Sonne Prince *Edwarde*, in all Maters concerning both his private Affayres, and publick Affayres of the Realme.

Willing, and charging them, and every of them, as they must and shall aunswer at the Day of Judgement, truely and fully to see this my last Will parformed in all thinges, with as mooch spede and diligence as may be; and that noon of them presume to medle with any of our Treaseur, or to do any thing appoincted by our say'd Will alone, onless the mooste Part of the hole Nombre of their Coexecutours doo consent, and by Writting agree to the same.

And will that our say'd Executours, or the mooste Part of them, may lawfully do what they shall thinke mooste convenient for Thexecution of this our Will, without being troubled by our say'd Sonne, or any others, for the same.

Willing farther by this our last Will and Testament, That Sir *Edmund Peckham* our trusty Servaunt, and yet Coferar of our House, shall be Treasorer, and have the Receipt and Layihg out of all such Treaseur and Money, as shall be defray'd by our Executours for the Parformaunce of this our last Will; straictly chardging and commaunding the say'd Sir *Edmunde*, that he pay no great Somme of Money, but he have furste the Haunds of our say'd Executours, or of the mooste Part of them, for his Discharge, touching the same; charging him further upon his Allegeaunce, to make a true Accompt of all such Sommes, as shall be delivered to his Handes for this Purpose. And sithens we have now named

and

and conſtituted our Executours, we woll and charge them, that furſt and above all thinges, as they will aunſwer before God, and as we put our ſinguler Truſt and Confidence in them, that they cauſe all our due Debts, that can be reaſonnably ſhewed and proved before them, to be truly contented and pay'd, aſſone as they conveniently can, or may, after our Deceas, without longer Delaye.

And that they do execute theſe Poincts *Furſt*. That is to ſay, the Payment of our Debts, with Redres of Injuries, if any ſuch can be duely proved, though to us they be unknowen, before any other Part of this our Will and Teſtament, our Buryall Exequyes and Funerals only excepted.

Furthermore We woll, that all ſuch Graunts and Gifts, as we have made, gyven, or promiſed to any, which be not yet parfaicted under our Signe, or any our Seales, as they ought to be, and all ſuch Recompenſes for Exchaunges, Sales, or any other thing or things, as ought to have been made by us, and be not yet accompliſhed, ſhall be parfaicted in every Point towards all maner of Men, for Diſcharge of our Conſcience; charging our Executors, and all the reſt of our Counſaillers, to ſee the ſame done, parformed, finiſhed, and accompliſhed in every Poinct, forſeing, that the ſay'd Gifts, Graunts, Promiſſes, and Recompenſſes ſhall appere to our ſay'd Executours, or the mooſt Part of them, to have been graunted, made, accorded, or promiſed by us in any maner wiſe.

Further, According to the Lawes of Almighty God, and for the Fatherly Love which we beare to our Sonne Prince *Edwarde*, and to this our Realme, we declare Him, according to Juſtice, Equite, and Conſcience, to be our Lawfull Heire; and do give and bequeath unto Him the Succeſſion of our Realmes of *Englande* and *Irlande*, with our Title of *Fraunce*, and all our Dominions, both on this ſide the Sees and beyond, (a convenient Portion for our Will and Teſtament to be reſerved.)

Alſo we give unto Him all our Plate, Stuff of Houſehold, Artilery, Ordenaunce, Munitions, Ships, Cabelle, and all other Things and Implements to them belonging, and Money alſo, and Jewelz, ſaving ſuch Portions, as ſhall ſatisfye this our laſt Will and Teſtament, charging,

and

and commanding Him, on peyne of our Curſe, ſeing He hath ſo loving a Father of us; and that our chief Labour and Study in this Woorld is, to eſtabliſh Him in the Crowne Imperial of this Realme, after our Deceaſſe, in ſuch ſort as may be pleaſing to God, and to the Wealth of this Realme, and to his owne Honour and Quyet; that he be ordered and ruled both in his Mariage, and alſo in ordering of Thaffaires of the Realme, as well outward as inwarde; and alſo in all his owne private Affaires; and in gyving of Offices of Charge by Thadvice and Counſail of our Right entirely-beloved Counſaillours,

Tharchbiſhop of *Cantorbury*,
The Lord *Wriotheſley*, Chancellour of *England*,
The Lord *St. John*, Great Maſter of our Houſe,
The Lord *Ruſſel*, Lord Privey Seale,
Therle of *Hertford*, Great Chambrelaine of *Englande*,
The Viſcount *Liſle*, High Admiral of *Englande*,
The Biſhop of *Dureſme*, *Tunſtall*,
Sir *Anthonye Brown*, Maſter of our Horſe,
Sir *William Paget*, our chief Secretarye,
Sir *Anthony Denny*,
Sir *William Herberd*,
Juſtices *Montague* and *Bromley*,
Sir *Edward Wootton*, and Mr. Doctor *Wootton*,
And Sir *Edward North*,

Whom we ordeyn, name, and appoinct, and by theſe Preſents, ſigned with our Hand, do make and conſtitute of Privey Counſail with our ſaid Sonne; and woll, that they have the Gouvernment of our mooſt deere Sonne Prince *Edwarde*, and of all our Realmes, Dominions, and Subjectz, and of all Thaffaires publicq and private, untill he ſhall have fully accompleted the Eightenth Yere of his Age. And for becauſe the Variete and Nombre of Things, Affaires, and Maters, ar and may be ſuch, as we not knowing the certainty of them before, cannot conveniently preſcribe a certain Order or Rule unto our foreſaid Counſaillours for their Behavoirs and Procedings in this Charge, which we have now, and do appoint unto them about our ſay'd Sonne, during the Tyme of his Minorite aforeſay'd.

We therefor, for the ſpeciall Truſt and Confidence which we have in them, woll, and by theſe Preſents

do give and graunt full Powre and Authorite unto our ſayd Counſaillours, that they all, or the mooſt part of them, being aſſembled togidres in Counſaill; or if any of them fortune to dye, the more Part of them which ſhall be for the tyme lyving, being aſſembled in Counſaill togidres, ſhall, and may make, deviſe, and ordeyn what things ſoever they, or the more Part of them, as aforſayd, ſhall, during the Minorite aforſayde of our ſaid Sonne, think meet, neceſſary, or convenient, for the Benefite, Honour, and Surety, or the Weale, Profet, or Commodite of our ſayd Sonne, his Realmes, Dominions, or Subjectz, or the Diſcharge of our Conſcience: And the ſame things deviſed, made, or ordeyned by them, or the more Part of them as aforſayd, ſhall, and may lawfully do, execute, and accompliſhe, or cauſe to be done, executed, and accompliſhed, by their Diſcretions, or the Diſcretions of the more Part of them, as aforſayde, in as large and ample maner, as if we had or did expreſſe unto them, by a more ſpecial Commiſſion undir our Great Seale of *Englande*, every particular Cauſe, that may chaunce or occurre during the Tyme of our Sonnes ſayde Minorite, and the ſelf-ſame maner of Proceeding, which they ſhall for the tyme think meet to uſe and follow.

Willing and charging our ſayd Sonne, and all others which ſhall hereafter be Counſaillours to our ſayd Sonne, that they never charge, moleſt, trouble, nor diſquyet our forſayde Counſaillours, nor any of them, for the deviſing, or doing, nor any other Perſonne for the doing of that they ſhall deviſe, or the more Part of them deviſe, or do, aſſembled as aforſaide.

And we do charge expreſſely the ſame our entierly beloved Counſaillours and Executours, that they ſhall take upon them the Rule and Charge of our ſayd Sonne and Heire, in all his Cauſes and Affaires, and of the hole Realme, doing nevertheleſſe all things, as under him, and in his Name, until our ſayde Sonne and Heire ſhall be beſtowed and maryed by their Adviſe, and that the Eightenth Yere be expyred.

Willing and deſyring furthermore our forſayd truſty Counſaillours, and then all our truſty and aſſured Servauntz, and *Thirdly*, all other our loving Subgectz, to

ayde

ayde and assist our fornamed Counsaillours in Thexecution of the Premisses, during the forsayde Tyme.

Not doubting but they will in all things deale so truely and uprightly, as they shall have cause to think them well chosen for the Charge committed unto them.

Straictly charging our sayd Counsaillours and Executours, and in God's Name we exhort them, that for the singular Trust and speciall Confidence, which we have and ever had in them, to have a due and diligent Eye, perfaict Zeale, Love, and Affection to the Honour, Surety, Estate, and Dignitye of our sayde Sonne, and the good State and Prosperite of this our Realme.

And that all Delayes sett apart, they will ayde and assiste our sayde Counsaillours and Executours to the Parformance of this our present Testament and last Will in every Part, as they will answer before God at the Day of Judgement,

Cum venerit Judicare vivos & mortuos.

And furthermore, for the special Trust and Confidence which we have in the Erles of *Arundel* and *Essex* that now be, Sir *Thomas Cheney* Knight, Treasorer of our Household, Sir *John Gage* Knight, Comptroler of our Household, Sir *Anthony Wingfeld* Knight, our Vice-Chambrelayn, Sir *William Petre* Knight, oon of our twoo Principall Secretaryes, Sir *Richard Rich* Knight, Sir *John Baker* Knight, Sir *Rouse Sadleyr* Knight, Sir *Thomas Seymour* Knight, Sir *Richard Southwell*, and Sir *Edmund Peckham* Knights, they, and every of them shall be of Counsayl for the ayding and assisting of the fornamed Counsaillours, and our Executours, when they, or any of them shall be called by our sayd Executours, or the more Part of the same.

Item, We bequethe to our Doughters *Mary* and *Elizabeth*'s Mariages, they being maryed to any outward Potentate, by Thadvise of the forsayd Counsaillours, if we bestow them not in our Life-time, Ten Thousand Pounds in Money, Plate, Jewelz, and Household-Stuffe, for ech of them; or a larger Somme, as to the Discretion of our Executours, or the more Part of them, shall be thought convenient: Willing them, on my Blessing, to be

be ordred, as well in Mariage, as in all other lawfull Things, by Thadvise of our forsayd Counsaillours; and in case they will not, thenne the Somme to be minished at the Counsaillours Discretion.

Further our Will is, that from the furst Howre of our Death, until such Tyme, as the sayde Counsaillours canne provide, either of them, or bothe, of sum honourable Mariages, they shall have eche of them Three Thousand Pounds, *ultra Reprisas*, to live on; willing and charging the forsayde Counsaillours, to limite and appoinct to either of them, such sage Officers, and Ministers for ordering thereof, as it may be employed both to our Honour and theirs.

And for the great Love, Obedyence, Chastness of Lief, and Wisedome, being in our fornamed Wief and Quene, we bequeth unto her for her proper Use, and as it shall pleas her to ordre it, Thre Thousand Pounds in Plate, Jewelz, and Stuff of Household, besides such Apparail, as shall pleas her to take of such as she hath alredy. And further we give unto her One Thousand Pounds in Money, with the enjoying of her Dower and Jointer, according to our Graunt by Act of Parliament.

Furthermore, for the Kindnes and good Service that our sayd Executours have shewed unto us, we gyve and bequeth to eche of them, such Sommes of Money, or the Value of the same, as hereafter ensuith.

		C.	
First, To Tharchbishop of *Cantorbury*	. .	v	*Marks*
To the Lord *Wriothesley*	. . . . .	v	*Lib.*
To the Lord *St. John*	. . . . .	v	*Lib.*
To the Lord *Russel*	. . . . .	v	*Lib.*
To the Erle of *Hertford*	. . . . .	v	*Lib.*
To the Viscount *Lisle*	. . . . .	v	*Lib.*
To the Bishop of *Duresme*	. . . .	iij	*Lib.*
To Sir *Anthony Brown*	. . . . .	iij	*Lib.*
To Sir *William Paget*	. . . . .	iij	*Lib.*
To Sir *Anthony Denny*	. . . . .	iij	*Lib.*
To Sir *William Herbert*	. . . . .	iij	*Lib.*
To Justice *Montague*	. . . . .	iij	*Lib.*
To Justice *Bromley*	. . . . .	iij	*Lib.*
To Sir *Edward North*	. . . . .	iij	*Lib.*
To Sir *Edward Wootton*	. . . . .	iij	*Lib.*
To Mr. Doctor *Wootton*	. . . .	iij	*Lib.*

Also

Alſo for the ſpeciall Love and Favour, that we bear to our Truſty Counſaillours, and other our ſay'd Servaunts hereafter following, we give and bequeth unto them ſuch Sommes of Money, or the Value thereof, as is lotted upon their Hede.

	C.	
Firſt, To Therle of *Eſſex*	ij	*Lib.*
To Sir *Thomas Cheney*	ij	*Lib.*
To the Lord *Herberd*	ij	*Lib.*
To Sir *John Gage*	ij	*Lib.*
To Sir *Thomas Seymour*	ij	*Lib.*
To *John Gates*	ij	*Lib.*
To Sir *Thomas Darcy* Knight	ij	*Lib.*
To Sir *Thomas Speke* Knight	ij	*Marks*
To Sir *Philip Hobby* Knight	ij	*Marks*
To Sir *Thomas Paſton*	ij	*Marks*
To Sir *Maurice Barkley*	ij	*Marks*
To Sir *Rafe Sadleyr*	ij	*Lib.*
To Sir *Thomas Carden*	ij	*Lib.*
To Sir *Peter Meutes*	ij	*Marks*
To *Edward Belingham*	ij	*Marks*
To *Thomas Audley*	ij	*Marks*
To *Edmunde Harman*	ij	*Marks*
To *John Pen*	j	*Marks*
To *Henry Nevil*	j	*Lib.*
To *Symbarbe*	j	*Lib.*
To *Cooke*	j	*Lib.*
To *John Osburn*	j	*Lib.*
To *David Vincent*	j	*Lib.*
To *James Ruſſorth*, Keeper of our Hous here	j	*Marks*
To *Cecill*, Yoman of our Robes	j	*Marks*
To *Sternhold*, Grome of our Robes	j	*Marks*
To *John Rouland*, Page of our Robes	1	*Lib.*
To Therle of *Arundell*, Lord Chambrelain	ij	*Lib.*
To Sir *Anthony Wingfeld*, Viz Chambrelain	ij	*Lib.*
To Sir *Edmund Peckham*	ij	*Lib.*
To Sir *Richard Riche*	ij	*Lib.*
To Sir *John Baker*	ij	*Lib.*
To Sir *Richard Southwell*	ij	*Lib.*
To Mr. Doctor *Owen*	j	*Lib.*
To Mr. Doctor *Wendy*	j	*Lib.*
To Mr. Doctor *Cromer*	j	*Lib.*
To *Alſop*	j	*Marks*

	C.
To *Patrick*	j *Marks*
To *Ayliff*	j *Marks*
To *Ferrys*	j *Marks*
To *Henry*	j *Marks*
To *Hollande*	j *Marks*
To the Foure Gentlemen Huishers of our Chambre, being dayly Wayters, in all	ij *Lib.*

And we will also, that our Executours, or the more Part of them, shall give Ordre for the Payment of such Legacyes, as they shall think meet to such our Ordenary Servauntz, as unto whom we have not appointed any Legacye by this our present Testament.

Finally, this present Writing in Paper, we ordeyn and make our Last Will and Testament, and will the same to be reputed and taken to all Entents and Purposes, for our good, strong, vaillable, mooft parfait, and Last Will and Testament, and do declare all other Wills and Testaments made at any Tyme by us, to be voyd, and of Non Effect.

In Witness whereof we have signed it with our Hand in our Palays of *Westminster*, the Thirty Day of *Decembre*, in the Yere of our Lord God A Thousand Fyve Hundred Fourty and Six, after the Computation of the Church of *England*, and of our Reign the Eight and Thirty Yere.

Being present, and called to be Witnesses, these Persones which have written their Names herunder.

Henry R.
John Gates.

George Owen.
Thomas Wendye.
Robert Haycke.

E. Harman.
Wylliam Sayntbarbe.
Henry Nevell.
Richarde Coke.
David Vincent.
Patzee.

W. Clerk.

Under his Royal Signet of Red Wax hanging by White and Green Ribbons.

The Will is written in Paper.

NUMB. IX.

Speech of the Lord Chancellor Ellesmere *in the Exchequer Chamber, touching the* Postnati, *p.* 104.

IN some Special Cases, there sometime may be a King of Subjects without Land in Possession, as Justice *Fenner* noted in the Government, which *Moses* had over the People of *Israel* in the Wilderness; and as in the Case, which Sir *John Popham*, the late Lord Chief Justice, did put in the Parliament: *If a King and his Subjects be driven out of his Kingdom by his Enemies, yet notwithstanding he continueth still King over those Subjects, and they are still bound unto him by their Bond of Allegiance, wheresoever he and they be:* But there cannot be a King of Land without Subjects; for that were but *Imperium in belluas*, and *Rex & subditi sunt Relativa.*

The Argument of Sir Francis Bacon *Solicitor-General, in the Case of the* Postnati, *in the Exchequer Chamber, before the Lord Chancellor, and all the Judges of* England. Resuscitatio, *Second Part, p.* 52, 53.

TO maintain our Assertion (*that it sufficeth to Naturalization, that there be one King, and that the Party be* natus ad fidem Regis) I will use three Kinds of Proofs.

The first is, *that Allegiance cannot be applied to the Law or Kingdom, but to the Person of the King; because the Allegiance of the Subject is more large and spacious, and hath a greater Latitude and Comprehension, than the Law, or the Kingdom; and therefore it cannot be a Dependency of that, without the which it may of itself subsist.*

The second Proof, which I shall use, is, That the Natural Body of the King hath an Operation and Influence into his Body Politick, as well as his Body Politick hath upon his Body Natural: And therefore, that although his Body Politick of King of *England*, and his Body Politick of King of *Scotland*, be several and distinct; yet nevertheless his Natural Person, which is one, hath an Operation upon both, and createth a Privity between them.

And

And the third Proof is, The binding Text of five ſeveral Statutes.

For the firſt of theſe, I ſhall make it manifeſt, that the Allegiance is of a greater Extent and Dimenſion, than Laws or Kingdom, and cannot conſiſt by the Laws meerly; becauſe it began before Laws, it continueth after Laws, and it is in Vigour where Laws are ſuſpended, and have not their Force.

That it is more ancient than Law, appeareth by that, which was ſpoken in the Beginning by Way of Inducement, where I did endeavour to demonſtrate, that the original Age of Kingdoms was govern'd by Natural Equity; that Kings were more ancient, than Lawgivers; that the firſt Submiſſions were ſimple, and upon Confidence to the Perſon of Kings; and that the *Allegiance of Subjects to Hereditary Monarchy*, can no more be ſaid to conſiſt by Laws, than the *Obedience of Children to Parents.*

That Allegiance continueth after Laws, I will only put the Caſe, which was remember'd by two great Judges in a great Aſſembly, the one of them now with God, which was; *That if a King of* England *ſhould be expuls'd his Kingdom, and ſome particular Subjects ſhould follow him in Flight or Exile in Foreign Parts, and any of them there ſhould conſpire his Death; that upon his Recovery of his Kingdom, ſuch a Subject might, by the Law of* England, *be proceeded with, for Treaſon committed and perpetrated, at what Time he had no Kingdom, and in Place where the Law did not bind.*

That Allegiance is in Force, where the Power of Law hath a Ceſſation, appeareth notably in Time of Wars; for *ſilent Leges inter Arma.* And yet the Sovereignty and Imperial Power of the King, is ſo far from being then extinguiſhed, as contrarywiſe it is raiſed, and made more abſolute; for then he may proceed by his Supreme Authority, and Martial Law, without obſerving Formalities of the Laws of his Kingdom. Thus far Sir *Francis Bacon.*

Theſe Paſſages ſhew, that it was the declared Opinion (and it appears not to have been contradicted) of a Lord Chancellor, two Judges, and a Solicitor-General, after Lord Chancellor, That Allegiance was due to a King diſpoſſeſſed; That Treaſon might be committed

againſt

against him, and was punishable by the Law of *England* after his Restauration. In the Case proposed, it cannot be doubted, but that the precedent Revolutions were in View, in all which, when one King was *driven out*, another took Possession.

It will be objected, that in the Case proposed, Allegiance is said to be due to the King expulsed (not by all, but only) by the *particular Subjects, who follow him in Exile.*

To this the Answer may be, That these great Lawyers, by affirming, that Allegiance is due to the *King expulsed, by the Subjects who follow him*, seem to have taught plainly, that it was due to him by all the Subjects: They affirm'd it of *some Particulars*, of whom they thought it could not be deny'd; and it seem'd superfluous to add, that the Obligation was the same on all the Subjects; because that follow'd evidently, as it appears to do from the Passages cited, and from the Reasons and Resolutions, on which that Case of the *Postnati* was determin'd.

1. The Instance of Allegiance due to a *King expuls'd* is brought to prove, that Allegiance is due to the King's Person, not to the Law, or Crown, or Kingdom; and supposing it due by all the Subjects to a *King expuls'd*, the Proof is evident: But if Allegiance is due by all the Subjects in the Kingdom to the King who possesses it, then this Instance disproves the Assertion it is brought to prove: For if the *King expuls'd*, by losing the Kingdom, loses the Allegiance of all the Subjects in it; it follows, that Allegiance was not due to the King's Person, but to the Crown or Kingdom, or that it was due (*a*) *more by reason of the King's Crown* (*that is of his Politique Capacity*) *than by reason of the Person of the King*, which *damnable and damned Opinion*, saith the Lord *Coke*, was *invented* by the *Spencers*.

(*a*) Coke's Reports, lib. 7. Calvin's *Case*, p. 11.

2. Sir *F. Bacon* affirms, that Allegiance was due before Laws, continueth when they cease by Expulsion, and is in Vigour when they are suspended by War: But the Duty of Allegiance in the first and last Case, must be extended to all the Subjects, therefore in the second; and his Reason proves it; for if Allegiance depends not on the Law, it is equally due by all the

Subjects, when the Law is suspended, when it ceases, and before it had Being.

(b) Coke, ibid. p. 4. 3. (b) *Ligeance and Obedience is an Incident inseparable to every Subject; ----- it joins together the Sovereign and all his Subjects* quasi uno Ligamine. (c) *Whosoever are born under one Natural Ligeance and Obedience*, owe it *by the Law of Nature to one Sovereign:* (d) *There is but one King and Sovereign, to whom this Faith and Allegiance is due by all his Subjects:* That the Natural Subjects of *England* may owe Allegiance to two Kings, that are Enemies, some to one, others to the other, is a monstrous Assertion, unknown to all Laws and Lawyers.

(c) Ibid. p. 24.

(d) Lord Ellesmere, p. 101.

(e) Coke, ibid. p. 12, 25. 4. In this Case it being agreed, (e) *That the Ligeance or Faith of the Subject is due unto the King by the Law of Nature, part of the Law of* England; this Inference was drawn, *That it cannot be alter'd*; and because it was *unalterable*, it was not *due by the Law and Constitution of Man:* But if Ligeance alway deserts the Unhappy, and enrolls under Success, the Law immutable changes with the Wind, and is more imperfect than humane Law, which never deprives any Man of his Right, because he is dispossess'd unjustly.

(f) Ibid. p. 10. 5. It was affirm'd, (f) That *the King holdeth the Kingdom of* England *by Birthright inherent, by Descent from the Blood Royal, whereupon Succession doth attend: And therefore it is usually said, to the King, his Heirs, and Successors, wherein Heirs is first nam'd, and Successors is attendant upon Heirs*; and again it is concluded, (g) That *our Ligeance is due unto our Natural Liege Sovereign, descended of the Blood Royal of this Realm*; and again *it manifestly appeareth, that to him the Ligeance or Faith of the Subject is* Proprium quarto modo, omni, soli, semper.

(g) Ibid. p. 12.

(h) Ibid. p. 10. 6. (h) *It was resolved, that it was due to the Natural Person of the King (which is ever accompanied with the Politick Capacity, and the Politick Capacity as it were appropriated to the Natural Capacity) and is not due to the Politick Capacity only:* Hence the Inference seems natural, that wherever the Person is, there is the *Natural*, and there the *Politick* Capacity appropriated to it.

7. It was determin'd, that the Ligeance of Natural Subjects (i) *is not circumscrib'd within any Place*, but is to be paid *in all Places whatsoever*; and the Reason given is,

(i) P. 7, 9.

is, that Ligeance is *a Quality of the Mind, not confined within any Place. He that is abjur'd the Realm*, amittit Regnum, sed non regem; amittit patriam, sed non patrem; *for notwithstanding the Abjuration, he oweth the King his Ligeance, and he remaineth within the King's Protection; for the King may pardon, and restore him to his Country again.* But when a Subject is abjur'd, and in a Foreign Country, what Subjection can he actually pay, what Protection actually receive, especially *in Time of War?* The King in many Cases cannot protect him, or any other Subject, *by the Sword*; yet his Ligeance continues; wherefore when it is said, that the King's *Power and Protection draweth Ligeance*, this cannot be understood of actual Protection, (which is often impossible both in Foreign and in Civil War) but of the King's Obligation to protect, as he has Power: For thus hath *Coke* out of *Skene* explain'd that Rule, which the (*k*) Doctor seems to understand of actual Protection. (*l*) *Ligeance is the mutual Bond and Obligation between the King and his Subjects, whereby his Subjects are call'd his Liege Subjects; because they are bound to obey and serve him; and he is call'd their Liege Lord; because he should maintain and defend them: ----- Therefore it is truly said, that* Protectio trahit subjectionem, & subjectio Protectionem; the *Maxim* cited by the Doctor, which a little before is thus paraphras'd, *Sicut subditus regi tenetur ad Obedientiam, ita Rex subdito tenetur ad protectionem*; the Obligation without doubt is mutual; but a Question is made, whether it is conditional, concerning which we have no Controversy.

(*k*) Defence, *p.* 111.
(*l*) Coke, ibid. *p.* 5.

8. *Lastly*, (*m*) Treason by the Common and Statute Law may be committed by the Subjects of *England* in Foreign Parts: But it seems a manifest Repugnancy, that by the same Law a Subject *following a King expuls'd*, may be lawfully punish'd, for paying his Allegiance to him, as he may be, if it is due by Law to the Possessor; and for breaking it, as he may be also, if the *King expuls'd recover his Kingdom.* And from these Premises we may draw this Conclusion; that the Legal Allegiance of all Natural Subjects is due to one Sovereign; and that where it is due by one Subject, it is due by every one.

(*m*) Bacon, ibid. *p.* 44.

FINIS.

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FOLIO.

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